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(20)

No. 06-637

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

PAUL G. GARDEPHE*
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PETITION FOR CERTIORARI FILED NOVEMBER 3, 2006
CERTIORARI GRANTED FEBRUARY 26, 2007

TABLE OF CONTENTS

Page

Appendix A — Relevant Docket Entries Of The United States Court Of Appeals For The Second Circuit 1a

Appendix B — Relevant Docket Entries Of The United States District Court For The Southern District Of New York (Foley Square) 6a

Appendix C — Findings Of Fact And Decision Of Impartial Hearing Officer, Dated April 6, 2000 .... 16a

Appendix D — Verified Petition, Dated May 16, 2000 ..... 39a

Appendix E — Verified Answer, Dated August 30, 2000 ..... 61a

Appendix F — Decision Of The State Review Officer, Dated March 30, 2001 ..... 66a

Appendix G — Opinion Of The United States Court Of Appeals For The Second Circuit In Frank G., *et al.* v. Board Of Education Of Hyde Park Central School District, Decided July 27, 2006 ..... 77a

Contents

Page

The following orders and statute have been omitted in printing this Joint Appendix because they appear in the Appendix of the Petition for a Writ of Certiorari on the following pages:

District Court Order Granting Summary Judgment, Dated January 3, 2005 ..... A1

Second Circuit Court of Appeals Summary Order Vacating And Remanding For Further Proceedings The District Court Judgment, Dated August 9, 2006 ..... A14

20 U.S.C. § 1412(a)(10)(C)(ii) A16

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

General Docket
US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 05-0566-cv Filed 2/3/05
Nsuit : 3890 STATUTES-Other
Board of Education v. F.
Appeal from: SDNY (NEW YORK CITY)

Case type information:

Civil
Private
None

Lower court information:

District: 01-cv-6845
Trial Judge: George Daniels
MagJudge:
Date Filed: 07/26/01
Date order/judgement: 1/6/2005
Date NOA filed: 1/31/2005

Fee status: Paid

Panel Assignment:

Panel: ALK RDS TS 40 Foley Sq.

Date of decision: 8/9/06

Appendix A

Prior cases: NONE

Current cases: NONE

Official Caption 1/

INDIV

DISPOSED

Docket No. [s] : 05-0566 -cv

Board of Education of the City School District of
The City of New York,

Plaintiff-Appellee,

v.

Tom F., on behalf of Gilbert F., a minor child,

Defendant-Appellant.

Authorized Abbreviated Caption 2/

Docket No. [s] : 05-0566 -cv

Board of Education v. F.

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].

2/ For use on correspondence and motions only.

Appendix A

Docket as of April 17, 2007 8:17 pm

INDIV

DISPOSED

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Appendix A

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Los Angeles Unified School District
Jay Worona Esq.(See above)
Amicus Curiae [LD n]

New York State School Boards Association, Inc.
Jay Worona Esq.(See above)
Amicus Curiae [LD n]
Tom F.
Paul G. Gardephe Esq.
Defendant-Appeliant [LD n]
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New York, NY, 10036
212-336-2000

INDIV

DISPOSED

Appendix A

* * *

8/9/06	Judgment filed; judgment of the district court is VACATED and REMANDED by detailed order of the court without opinion filed. (RDS) [Entry date Aug 9 2006] [AM]

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. DISTRICT COURT
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)
CIVIL DOCKET FOR CASE #: 1:01-CV-06845-GBD

Board of Education of the City School District of the City of New York v. Tom F., on behalf of Gilbert F., a minor child
Assigned to: Judge George B. Daniels
Referred to: Magistrate Judge Michael H. Dolinger (Settlement)
Demand: $0
Cause: 28:1331 Fed. Question: Other

Date Filed: 07/26/2001
Date Terminated: 01/06/2005
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Appendix B

Plaintiff

Board of Education of the City School District of The City of New York.
represented by
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(212) 788-0956
LEAD ATTORNEY

V.

Appendix B

Defendant

Tom F.
on behalf of Gilbert F., a minor child
represented by
Lauren A. Baum
Neal H. Rosenberg
9 Murray Street
Suite 4 West
New York, NY 10007
(212) 732-9450
LEAD ATTORNEY

Date Filed	Docket Text

* * *

08/14/2001	ORDER, initial pretrial conference will be held for 12:00 10/10/01, in courtroom 219, 40 Foley Sq., NY, NY. (signed by Judge George B. Daniels) (cd) (Entered: 08/15/2001)
09/06/2001	Memo-Endorsement on letter addressed to Judge Daniels from Neal Howard Rosenberg, dated 08/23/01; Defendant's request for an extension of time until 09/28/01 to respond to plaintiff's amended complaint is granted; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 09/07/2001)

Appendix B

10/02/2001	Memo-Endorsement on letter addressed to Judge Daniels from Neal Howard Rosenberg, dated 9/28/01; granting counsel for the defendant's request to extend the time to respond to the amended complaint from 9/28/01 until 11/9/01. (signed by Judge George B. Daniels); Copies mailed. (kkc) (Entered: 10/03/2001)
11/13/2001	ANSWER to Complaint by Tom F. (Attorney Lauren A. Baum from the Firm: Neal H. Rosenberg). (yv) Modified on 3/22/2007 (kkc). (Entered: 11/15/2001)

* * *

11/20/2001	ORDER; pltff's motion for summary judgment is due on 1/25/02. Deft's cross motions for summary judgment is due 3/8/02. Any reply by pltff is due by 4/2/02. (signed by Judge George B. Daniels); Copies mailed. (sn) (Entered: 11/21/2001)
01/25/2002	REVISED ORDER, reset pltff Board of Education's motion for summary judgment filing deadline for 2/15/02; reset deft's cross motion for summary judgment due for 3/29/02; Any reply by pltff is due by 4/19/02. The parties do not request oral argument. (signed by Judge George B. Daniels); Copies mailed. (kg) (Entered: 01/28/2002)

Appendix B

02/01/2002 Memo-Endorsement on letter addressed to Judge Daniels from Michael Delarco, dated 1/31/02, granting plntf's request that the 2/6/02 conference be adjourned until sometime after the motion for summary judgment has been fully briefed (signed by Judge George B. Daniels); Copies mailed. (cd) (Entered: 02/04/2002)

02/14/2002 Memo-Endorsement on letter addressed to Judge Daniels from Michael Delarco, dated 02/13/02; reset plaintiff's summary judgment motion filing deadline for 2/25/02; reset defendant's summary judgment cross motion due for 4/8/02; plaintiff's reply is extended until 04/29/02; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 02/19/2002)

02/25/2002 REVISED ORDER; Plaintiff Board of Education's motion for summary judgment is due on 03/11/02; Defendant's cross-motion for summary judgment is due on 04/22/02; any reply by plaintiff is due by 05/13/02. the parties do not request oral argument;(signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 02/26/2002)

03/08/2002 ORDER, that plaintiff Board of Ed. motion for summary judgment is due no 3/25/02; Defendant's cross-motion for summary judgment is due on 5/6/02; Any reply by

plaintiff is due by 5/28/02; The parties do not request oral argument. (signed by Judge George B. Daniels); Copies mailed. (tp) (Entered: 03/08/2002)

* * *

03/29/2002 NOTICE OF MOTION by Board of Education for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. Return date not indicated. Statement of Undisputed Facts and Declaration of Michael Delarco in support of motion attached. (yv) (Entered: 04/01/2002)

03/29/2002 MEMORANDUM OF LAW by Board of Education in support of [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (yv) (Entered: 04/01/2002)

05/02/2002 ORDER; deft's cross-motion for summary judgment is due on 6/3/02; pltff's reply is due 6/25/02 for [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (signed by Judge George B. Daniels); Copies mailed. (sac) (Entered: 05/03/2002)

06/06/2002 ORDER. Plaintiff Board of Education's motion for summary judgment is due on 03/25/02; Defendant's cross-motion for

summary judgment is due on 06/07/02; any reply by plaintiff is due by 07/01/02. Parties do not request oral argument; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 06/12/2002)

* * *

06/12/2002 MEMORANDUM OF LAW by Tom F. in support of [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, and [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)

06/12/2002 MEMORANDUM OF LAW by Tom F. in support of re: [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant, and in opposition to [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)

Appendix B

06/12/2002	RULE 56.1 STATEMENT filed by Tom F. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)
07/02/2002	ORDER, Response to motion reset to 7/22/02 for [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, reset to 7/22/02 for [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant , reset Reply to Response to Motion reset to 7/22/02 for [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (signed by Judge George B. Daniels); Copies mailed. (pl) (Entered: 07/02/2002)
07/23/2002	REPLY MEMORANDUM by Board of Education re: defendant's opposition memorandum of law and in opposition to [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (yv) (Entered: 07/25/2002)
07/23/2002	DECLARATION of Michael DeLarco by Board of Education presenting before the

Appendix B

Court documents in support Re: [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff and in opposition to [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (yv) (Entered: 07/25/2002)

01/04/2005 ORDER granting [13] Motion for Summary Judgment, denying [17] Motion for Summary Judgment. The Clerk is directed to close this case (Signed by Judge George B. Daniels on 1/3/05) (yv,) (Entered: 01/05/2005)

01/04/2005 Transmission to Judgments and Orders Clerk. Transmitted re: [24] Order on Motion for Summary Judgment, to the Judgments and Orders Clerk for preparation of Judgment. (yv,) (Entered: 01/05/2005)

01/06/2005 CLERK'S JUDGMENT granting plaintiff's motion for summary judgment reversing the SROs grant of tuition reimbursement to defendant and denying defendant's motion. (Signed by J. Michael McMahon, clerk on 1/6/05) (ml,) (Entered: 01/06/2005)

Appendix B

01/31/2005	NOTICE OF APPEAL from [24] Order on Motion for Summary Judgment,. Document filed by Tom F. Filing fee $ 255.00, receipt number E 532562. Copies of Notice of Appeal mailed to Attorney(s) of Record: NYC Corporation Counsel. (pr,) Modified on 3/22/2007 (kkc). (Entered: 02/01/2005)

* * *

03/02/2005	USCA SCHEDULING ORDER as to [26] Notice of Appeal filed by Tom F., USCA Case Number 05-0566-cv. Roseann B. MacKechnie, Clerk USCA. Certified: 2/24/05. Appeal Record due by 3/24/2005. Appellant Brief due by 3/31/2005. Appellee Brief due by 5/2/2005. (dt,) Modified on 3/22/2007 (kkc). (Entered: 03/07/2005)

* * * *

APPENDIX C — FINDINGS OF FACT AND DECISION OF IMPARTIAL HEARING OFFICER, DATED APRIL 6, 2000

Board of Education of the City of New York
Impartial Hearing Office
131 Livingston Street - Room 201
Brooklyn, New York 11201
Telephone: (718) 935-3280
FAX: (718) 935-2528

FINDINGS OF FACT AND DECISION

Case Number:	37710
Student's Name:	Gilbert Freston
Date of Birth:	October 1, 1989
District:	3
Hearing Requested By:	Parent
Dates of Hearing:	January 6, 2000 January 21, 2000 January 31, 2000 February 28, 2000
Hearing Officer:	Michael Lazan, Esq.

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 6, 2000

Neal Rosenberg	Attorney	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 21, 2000

Neal Rosenberg	Attorney	Parent
Alexandra Michalos	Attorney, Officer of Legal Services	Board of Education
Helen Reichel	Chairperson Designee, Educational Evaluator, CSE, District 3	Board of Education
Craig Czanecki	Psychologist, CSE, District 3	Board of Education

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 31, 2000

Neal Rosenberg	Attorney	Parent
Anne Marie Bowler	Law Clerk	Parent
Tom Freston	Father	
Krista Stackow (via telephone)	Teacher, Steven Gaynor School	Parent
Alexandra Michalos	Attorney, Office of Legal Services	Board of Education

NAMES AND TITLES OF PERSONS WHO APPEARED FEBRUARY 28, 2000

Neal Rosenberg	Attorney	Parent
Laura Keller (via telephone)	Pathologist. Steven Gaynor School	Parent
Susan Miller (via telephone)	Reading Teacher. Steven Gaynor School	Parent
Alexandra Michalos	Attorney, Office of Legal Services	Board of Education
Jennifer Feinberg (via telephone)	Teacher	Board of Education

Appendix C

On January 21, January 31, and February 28, 2000, the matter of Gilbert F. came before me as impartial hearing officer pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f)(1). (The hearing was previously adjourned by another hearing officer.) Appended to the record is a list of persons in attendance and of documents submitted into evidence. The hearing was convened on the parent's request for *Florence County School District Four v. Carter by Carter,* 114 S.Ct. 361 (1993) reimbursement.

Gilbert is a ten year old classified as learning disabled who attends a non-public school, the Stephen Gaynor School (Gaynor), in Manhattan. After a Committee on Special Education (CSE) review indicating Gilbert should be placed in a Modified Instructional Services 1 (MIS 1) class the parent objected and sought tuition reimbursement. The hearing followed.

BOARD OF EDUCATION'S TESTIMONY AND EVIDENCE

The Board of Education testified by Helen Reichel, an educational evaluator; Craig Czarnecki, a school psychologist; and Jennifer Feinberg, a teacher.

Dr. Czarnecki testified that he observed Gilbert in his classroom and participated in the CSE review pertaining to Gilbert. Though he did not conduct the psychological evaluation, he testified to the evaluation by describing Gilbert as a child who gave short answers to questions but nonetheless was able to obtain average to high average scores

on the Weschsler Intelligence Scale for Children III with relative sub-strengths in verbal abstract reasoning. (Tr. at 9, 10)

In terms of graphomotor and fine motor coordination, his formal score was below average. With respect to emotional testing. Gilbert had difficulty expressing his feelings, needed a lot of encouragement and seemed to lack in self-confidence and self-esteem, though he had good reality testing and a high level of aspiration. (Tr. at 10)

The review team indicated that this was a child with academic weakness and difficulty maintaining focus. He has Attention Deficit Disorder and is receiving medication. Counseling was recommended to bolster self-esteem, with related goals. (Tr. at 13-14)

The observation, at Gaynor, did not reflect any "silliness" or emotional issues. (Tr. at 16)

On cross-examination, Dr. Czarnecki indicated that he had been told by a "Susan Clue" at Gaynor that teachers at Gaynor would be available on June 23, 1999, the date of the review. However, when the school was called the review team was told that no teachers were available that day. The review had originally been scheduled for May, but was rescheduled to the only mutually available date, June 23. He testified that the teachers were in the building but were involved in meetings. (Tr. at 17-18, 20) The review team was told that, after the day in question, the teachers would be off for the summer and no one was available to speak with them. (Tr. at 30)

He indicated that drafts of the speech and language goals were brought to the CSE review meeting. He testified that some goals were draft goals, and some were developed at the review. (Tr. at 23, 25) No speech and language therapist was at the review. (Tr. at 29)

He indicated that the child had been through two speech/ language therapy evaluations in the 1998-1999 school year which showed weakness in listening for paragraphs. As a result, speech and language remediation was recommended. (Tr. at 34-35)

On further questioning, he indicated that the special education teacher at the review was Ms. Reichel. He indicated that Gilbert's learning disability was in reading and spelling. (Tr. at 37-38) He indicated that the review learn credited the speech and language evaluation of Ms. Pivor (who recommended therapy) over the recommendation of Ms. Baldinger (who didn't) because a child who has listening deficits will have trouble in a classroom setting. (Tr. at 46)

He indicated that no speech and language therapist was at the review because none was available and a prior consultation had been done. He did not indicate affirmatively that draft goals were changed at the review, indicating that it can be that many children with the same kind of learning problem can have the same goals. (Tr. at 49, 50-51)

Ms. Reichel an educational evaluator who is also a licensed special education teacher testified that she did not conduct the review but did review Gilbert's records. (Tr. at 59-60) She indicated that Gilbert had trouble in reading

comprehension which was measured in the low average range. She also indicated that he had trouble with decoding where there are consonant clusters and diphthongs. Overall, his decoding was at the mid-third grade level "instructionally" and that his comprehension was at the mid-second grade level "instructionally." In math, he did well, but had trouble with so-called "two-step" problems. In writing, his spelling was problematic and his written expression was generally unenriched. In terms of expressive language, he did not initiate the conversation. (Tr. at 60-66)

In terms of the speech and language evaluations, Gilbert had trouble with oral listening, especially where there was no visual accompaniment to the auditory, and oral narration. (Tr. at 69-70)

An occupational therapy report found that Gilbert had adequate handwriting skills. (Tr. at 72-73)

A MIS I was recommended because of his learning disabilities and his attentional problems require a multi-sensory approach. (Tr. at 73-74)

At the review, the team went over the reports and developed the goals. Most of the goals were written before the meeting. The goals were not necessarily reviewed with the parent. (Tr. at 75-76, 78)

On cross-examination-examination, she indicated that she had not discussed the goals or the case generally with Dr. Hager, who had done the educational evaluation. She did not discuss the goals or the case generally with his teacher.

In writing the goals, she did not discuss the goals or the case generally with anyone except Ms. Pivor. (Tr. at 90, 93, 95)

She indicated that though the evaluator recommended giving Gilbert the use of a computer, this was not included on his IEP because it was not corroborated by the occupational therapy or the teacher report. (Tr. at 95)

On further questioning, she indicated that she had not taught special education in fifteen years. She indicated that the CSE review meeting was originally set up for May 28th, but it had been canceled. (Tr. at 100-104)

Ms. Feinberg testified that she teaches at a MIS 1 classroom at P.S. 77, the Lower Lab School for Gifted Education. (Tr. at 199) There are nine students in the class with student teachers three days a week. The age range in the class is 8-10, and the functional levels of the children is K to high third grade level in reading, and K to fourth grade in math. (Tr. at 201-202)

With respect to reading, two children are in the K range. The majority of the children are in the first to second grade level. With respect to math, two children are in the K range. The majority of the children are in the "two to three" range. (Tr. at 202)

In view of Gilbert's IEP, indicating that Gilbert's decoding was mid-third grade and his reading comprehension was mid-second grade she indicated that one student would be at his level insofar as decoding was concerned and three students would be at his level insofar as comprehension was

concerned. She indicated that she addresses the range of functioning levels in the class by practicing "private reading" and having individual reading groups. The reading program is a "balanced literacy" program with reading aloud, shared reading, guided reading, and reader's workshops. (Tr. at 203) She indicated that, during reading, it's very individualized. (Tr. at 209)

She indicated that she would work on Gilbert's spelling by interactive writing sessions where students come up with their own strategies for spelling. She would work on Gilbert's writing by using "webbing," where characters are developed. The math curriculum is "hands on" where children work in pairs or independently to solve problems and that, thereafter, the children meet in a circle to discuss strategies used. To deal with social and behavioral issues, a very positive reinforcing environment is established. No children have severe behavioral issues, though some do get counseling. The children's physical development is such that one child receives occupational therapy. (Tr. at 204, 206-207)

Insofar as Gilbert's levels are concerned in comparison to the other children in the class, his math is higher than the majority and his reading is higher than the majority, though there are students at his level. (Tr. at 208) She indicated that his placement would be appropriate in her class. (Tr. at 211)

On cross-examination she indicated that the student teacher is at the school three days a week to last and until NYU closes for the school year. (Tr. at 213-214) She indicated that with respect to reading levels in her class, that they specifically ranged from .7 to 3.7. Math levels range from a

.7 to a 4.0, but that the child whose level is 4.0 is mainstreamed with a class of gifted children. There are four groups of reading students and two groups of math students in the class. The student teacher benefits the children when she is in class, but the teaching is not any different. When the children are pulled out for science, Spanish, art and music, for a total of seven periods per week, they are not taught by trained special education teachers. (Tr. at 218-219, 220, 222, 224-225)

On further questioning, she indicated that when her class is being taught subjects that require reading, lessons are read aloud. (Tr. at 226-227)

The Board of Education also presented legal arguments contending the annual review process has no timeline, that the Board of Education can appoint a teacher qualified in the area of disability for the purposes of the review, and that children in the child's class can exceed three years in range of functioning. (Tr. at 185-187)

THE PARENT'S TESTIMONY AND EVIDENCE

The parent presented himself; the testimony of Anne Marie Bowler, a law student; Krista Stachow, Gilbert's teacher: Laura Keller. Gilbert's speech and language teacher; and Susan Miller. Gilbert's reading teacher.

The parent indicated that he traveled from Asia to appear at the Board of Education on May 28th for a CSE review meeting. He indicated that the meeting was cancelled because a Board of Education party was not able to attend. He was

then told of the rescheduled date, June 23rd,without being asked previously about whether the time and date were good for him. He did appear, however, on June 23rd. He indicated that Iris Fruend. an individual at the CSE meeting, is in fact one of Gilbert's teachers. (Tr. at 114-115, 122)

The parent received a notice of placement on July 29, 1999. He indicated that he promptly attended all meetings called by the CSE in regard to Gilbert's evaluation. He indicated that he would have observed the Board of Education's placement if it were made prior to the end of the prior school year. (Tr. at 116, 122)

He indicated that he pays for private speech/language therapy yearly, and that Gilbert receives speech/language therapy from the school. (Tr. at 118)

He indicated that he has seen steady improvement at Gaynor to the point where he wonders whether Gilbert should be mainstreamed, though people at Gaynor convinced him that he still needed a "close hands on" relationship with teachers. (Tr. at 119) He indicated that at Gaynor. they pull Gilbert out for reading and speech, his core learning disabilities. (Tr. at 119-120)

On cross-examination he indicated that he has never visited a recommended public school placement before. He indicated that Gilbert goes to a summer camp for "regular" children. He indicated that he needs a class size smaller than 15:1, and that he now is in a class of 6 or 7 with 2 teachers. He indicated that he had read the goals on the IEP but didn't remember whether he had any objections to them. (Tr. at 123, 125-126)

On further questioning, he indicated that Gilbert has been at Gaynor since kindergarten since he had been evaluated and diagnosed as learning disabled early on. (Tr. at 128-129) He indicated that Gilbert's learning disability is language-based, and that attention deficit hyperactivity disorder (ADHD) "underlines" a lot of his behavior. His reading skills are not great, writing skills below grade level and he has difficulty detecting nuances in speech. (Tr. at 129, 130)

When asked how Gilbert would do in a MIS 1 program, the parent indicated that "he didn't know" but that he had been told by the people at Gaynor that the class size he is in now is very advantageous to him. (Tr. at 130)

In terms of progress, he testified that Gilbert now picks up a book without prodding and is more interested in the outside world. (Tr. at 130-131)

Ms. Bowler, a law student at the office of Neal Rosenberg, Esq. who accompanied the parent to the CSE meetings testified that with respect to the first meeting, she and the parent were told that there was no parent member available and that the meeting had to be rescheduled. At the second meeting on June 23rd she indicated that there was no appearance from anyone at Gaynor there. (Tr. at 141)

On cross-examination she indicated that she knew there was no representative from Gaynor at the review because the parent did not recognize any such person and did not speak to any of the "Board of Education" people at the meeting. (Tr. at 143) She look notes right after the meeting memorializing this. (Tr. at 145: Exh. A)

Appendix C

Ms. Stachow, Gilbert's teacher, testified that she teaches eight students with another teacher, ranging from 9.11 to 11.2. All children have learning disabilities, and all have speech and language issues. Seven out of eight children, including Gilbert, have language-based learning disabilities. Comprehension difficulties are prevalent. (Tr. at 150-151)

Gilbert has problems with expressive language manifesting in a lack of specificity, weak vocabulary and weak word find skills. He has difficulty formulating ideas and receptive language difficulties as well. His speech and language difficulties are not in the conventional sense in that people can't understand him. He reads at a fourth grade level. (Tr. at 152, 161)

She indicated that Gilbert gets language remediation once a week with another student, with a speech and language therapist for a half-hour. He sees a speech and language therapist, two times a week after school. Also, speech and language therapists come into the classroom to work with him. Reading remediation is provided once a week, ratio of 2:1, for a half hour. His reading group was 2:1, will temporarily be 8:1 since the teacher will be leaving because of pregnancy, then 3:1 in March. The second teacher, who is a special education teacher, will lead the class. The class work consists of teacher-made materials, with a lot of Orton-Gillingham materials. (Tr. at 153-155, 161)

She continued that Gilbert has difficulty writing, organizing and formulating thoughts. Writing is taught with three teachers. A computer is needed to minimize his frustration with writing since he enjoys working with a computer. (Tr. at 153, 156-157)

She indicated that she reviewed the goals on the IEP, and indicated that Gaynor could meet all the goals on the IEP. (Tr. at 158)

With respect to the recommended program, she indicated that the 15:1 ratio could he a bit overwhelming to Gilbert but is not too much of a change. Having just one teacher would be overwhelming to Gilbert. She indicated that Gilbert lacks self-confidence, is not very communicative with adults, and is very silly. (Tr. at 158-159)

His behavior has improved during the current school year and he has improved in decoding, comprehension, multiplication and division. (Tr. at 160) The ADHD manifests itself in the classroom, and he needs a lot of prompting to return to task. A small group is necessary to deal with the ADHD. (Tr. at 160-161)

She indicated that the last day of school was June 9th. On June 23rd, his teacher from last year. Ms. Shapiro, was in the hospital. Teachers are not required to be at the school after June 9th. (Tr. at 162-163)

On cross-examination, she indicated that, two weeks after school is over at Gaynor, there is a summer camp program which meets on the school steps and goes into the park. She indicated that a small class size is needed primarily due to Gilbert's learning disabilities since at instructional time he stays quiet. She indicated that since he is not used to learning in a bigger class, he would retreat and not volunteer as much. (Tr. at 163-164, 165-166) Also, since he's very impulsive and requires redirection, he would have difficulty with only one teacher in the class. (Tr. at 179)

Appendix C

In math, the functional levels in his group of five children range from 4.1 to 4.5. The reading levels in his group of eight children are 3.5 to 4.5, decoding, and third grade to 4.5, in comprehension. Gilbert is on the lower end "comprehension-wise" and therefore gets remedial reading, during which he is pulled out of class and misses "book club" where children read independently. (Tr. at 167-168)

When confronted with the fact that with respect to comprehension, the evaluator found that his skills had regressed from 1997-1998 to 1995-1999, she indicated that his comprehension skills do need a lot of guidance but indicated that any increased difficulty might have been due to the increased difficulty of the coursework. She indicated that she had seen progress in reading. When confronted with the fact that, with respect to math reasoning, the evaluator found that his skills had regressed from 1997-1998 to 1998-1999, she answered that she did not know about progress in the prior school year. She did indicate that his math level was 4.1. His reading level is a 3.5. (Tr. at 172-174, 176-177)

There is no opportunity to be with non-disabled peers at Gaynor. The school staff feels that Gilbert will be able to be mainstreamed within a few years, but with extra services. (Tr. at 174-175) She did not know who Iris Fruend is. (Tr. at 174-175, 178)

Ms. Keller, a speech and language pathologist at Gaynor, sees Gilbert once a week in a dyad, twice a week during his writing lesson and once for "language group." She indicated that he needs this level of speech and language involvement because he has receptive and expressive difficulties. With

respect to expressive language, his output is reduced, he is very non-specific. He has difficulty organizing his thoughts and ideas so that structure and guidance is necessary. With respect to receptive language, he needs instructions to be simplified or repeated. (Tr. at 229-231)

He has benefited from the involvement of Ms. Keller insofar as his assignments are improved. She coordinates these lessons with the teacher. (Tr. at 232)

On cross-examination, she indicated that she had not done any speech and language evaluations on Gilbert. (Tr. at 233-234) She indicated that the speech and language recommendation of the Board of Education, in a group of three, was not her preference because when there are three, you sometimes lose focus. (Tr. at 233-234, 240)

Ms. Miller testified that she is Gilbert's reading specialist. She works with him in a group of two. Gilbert's weaknesses lie in reading comprehension and in his understanding of language; he either doesn't understand or takes things too literally. To help with his comprehension problems, she is working on vocabulary development on such things as prefixes and suffixes. She indicated that he needs the additional reading assistance and is benefiting from it, mostly in decoding. (Tr. at 241-244, 246)

On cross-examination, she indicated that his in-class reading group is too big for him to get the intense instruction he needs because he's a very passive person. (Tr. at 247)

On further questioning, she indicated that he is taking more chances, say, in terms of making a prediction as to what will happen in a particular piece. (Tr. at 248)

The parent also made legal arguments on the record, mostly in regard to procedure. The parent argued the final notice should he sent during the school year so the parent might have an opportunity to actually view an example of the recommended program. Additionally, he argued that with respect to the timeliness of an annual review, a reasonableness standard should apply, and that this process, beginning in September 1998 and ending in August 1999, took too long. (Tr. at 133-134-135)

FINDINGS AND DECISION

The Board of Education may be required to pay for educational services obtained for a student by a student's parent if the services offered by the Board of Education are inadequate or inappropriate (prong one), the services selected by the parent are appropriate (prong two), and equitable considerations support the parent's claim (prong three), even if the private education sought by the parents lacks State approval. (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 [1985]; *Carter*) The Board of Education bears the burden of demonstrating the appropriateness of the program recommended by its CSE. (New York State Review Officer's Decision. No. 93-9) To meet its burden, the Board of Education must show that the recommended program is reasonably calculated to allow the child to receive educational benefits. (*Board of Education Hendrick Hudson CSE v. Rowley*, 458 U.S. 176 [1982])

Appendix C

In this matter, much time has been devoted to dissecting the importance of the Board of Education's failing to have a special education teacher at the relevant CSE review on June 23, 1999.[1] The IDEA Amendments of 1997, however, are clear on this issue. The Amendments specifically required the IEP team to include "at least one special education teacher, or where appropriate, at least one special education provider *of such child*," (emphasis added) making clear that the child's actual special education teacher should be at the meeting (614[d][1][B][iii])

The requirement makes sense. It is hard to see how a group of even highly talented people could conscientiously make a determination about a child's educational program without the input of the person who has been most closely monitoring that child's educational progress over the course of the past year. The Board of Education argues that the failure to have the special education teacher at the CSE meeting can be excused because the special education teacher was not able to appear. However, the special education teacher was in fact ready to appear at a previous date when the Board

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1. It should be noted that the parent in this matter did testify that a teacher from Gaynor was at the CSE review, pointing to Iris Fruend as the teacher. However, I find that the parent was mistaken in this regard. A law student attending the review with the parent who took notes specifically remembered that the parent did not recognize anyone at the review. Moreover, Ms. Stakow, the teacher from Gaynor, did not recognize the name of Iris Fruend as a teacher from Gaynor. Finally, and most tellingly, the CSE Review rationale indicates that the "[r]eview team attempted to contact Stephen Gaynor School but were informed that there was no one who could participate in review." (Exh. 2)

of Education failed to bring a parent member and abruptly cancelled the meeting. Further, the case the Board of Education relies upon for the proposition that it can comply with its statutory obligation by designating its own teacher is outdated since it refers to regulations that pre-date the current IDEA Amendments. (New York State Review Officer's Decision, No. 96-18) The Board of Education should have been more careful to insure that the parent member attended the first review, especially given that the school year was about to end and that subsequent teacher unavailability was foreseeable.

The parent also raises significant substantive issues with the proposed program, in particular with respect to the levels in the class. Gilbert was deemed on a fourth grade level in math computation as of April, 1999, and yet the Board of Education deemed it appropriate to place Gilbert in a class where some children perform math at a kindergarten level (as measured in February 2000). The teacher sought to explain this discrepancy by indicating that the children work individually and then discuss their work in "circles," but it is not altogether clear what a higher functioning child would learn when kindergarten-level materials are being discussed in such circles. The teacher did mention that there is a child in such class with a math level akin to Gilbert's and that this child was mainstreamed into regular education (for math). However. It was not specifically indicated that Gilbert was to be mainstreamed for math. Nor was it satisfactorily explained how Gilbert could attend a fourth grade level math class in a school for gifted children, where, presumably, the pace of the work would be faster than usual and the ratio would be larger than Gilbert could handle. As a result, I find

the Beard of Education has not offered an appropriate program and that the parent has met his burden on "prong one."

Insofar as "prong two" is concerned, there was more than sufficient testimony that the program at Gaynor is suiting Gilbert's needs and providing him with an appropriate education.

The parent indicated that he had seen steady improvement at Gaynor, and his teacher indicated that he has improved in decoding, comprehension, multiplication, division, and also in regard to his behavior. The Board of Education argued that Gilbert did not progress in the 1998-1999 school year when comparing the evaluations from the 1997-1998 school year, but when comparing Gilbert's math and reading levels as tested in April 1999 to the curtail levels reported by his teacher there is evidence that progress has been made. For instance, in reading comprehension Gilbert's level was reported as mid-second grade as of April 1999; as of February 2000, his level was 3.5. (*see* Gaynor progress report. Exh. 1 at 3) This progress can be traced to the thorough reading program at Gaynor, which includes an additional reading teacher and a speech and language therapist who works on skills that are applicable to reading. As a result, I find that the parent has met his burden on "prong two."

In regard to equities, the parent did everything asked of him by the Board of Education in regard to this matter. Though the parent did not seem to have particular interest in the public school site in question the law does not require the parent to be fully committed to public school before

allowing an award of reimbursement. (*See* New York State Review Officer's Decision. No 96-53: though parent made no secret of preference to keep child in private school, reimbursement awarded). Accordingly, I find the parent is entitled to reimbursement under *Carter*.

ORDER

In view of the foregoing, the Board of Education is hereby ordered to reimburse Gilbert's parents for the cost of tuition for the 1999-2000 school year upon presentation by the parent of proof of payment. Such proof is to be submitted directly to the Board of Education.

Dated: April 6, 2000

s/ Michael Lazan
MICHAEL LAZAN, ESQ.
Impartial Hearing Officer

PLEASE TAKE NOTICE

Within 30 days of the receipt of this decision, the parent and/or Board of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act. Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and forms for filing an appeal are included with this decision.

DOCUMENTATION ENTERED INTO RECORD JANUARY 21, 2000

~~1.~~	C-10 Form, 07/29/99, 1 p.	Board of Education
~~2.~~	CSE Review, 06/23/99, 1 p.	Board of Education
3.	IEP, 6/23/99, 21 pp.	Board of Education
~~4.~~	M-2 Meeting Notice for EPC/CSE Review. 05/18/99, 1 p.	Board of Education
~~5.~~	Social History Report, 07/02/98, 3 pp.	Board of Education
~~6.~~	Occupational Therapy Assessment, 04/22/99, 1 p.	Board of Education
~~7.~~	Speech and Language Evaluation, 09/25/98, 15 pp.	Board of Education
~~8.~~	Specch and Language Evaluation, 04/30/99, 3 pp.	Board of Education
~~9.~~	Psychological Report, 04/10/99, 6 pp.	Board of Education
~~10.~~	Classroom Observation, 01/28/99, 1 p.	Board of Education

~~11.~~	Educational Evaluation Report, 04/10/99, 7 pp.	Board of Education
~~12.~~	Progress Report, '98-'99, 16 pp.	Board of Education
~~13.~~	M-2 Meeting Notice for EPC/CSE Review, 05/18/99, 1 p.	Board of Education
~~14.~~	Medical Documentation Form. 04/23/99, 2 pp.	Board of Education

DOCUMENTATION ENTERED INTO RECORD JANUARY 31, 2000

A.	Notes, Undated, 2 pp.	Parent

DOCUMENTATION ENTERED INTO RECORD FEBRUARY 28, 2000

L.	Progress Report, '99-'00, 16 pp.	Impartial Hearing Officer

APPENDIX D — VERIFIED PETITION, DATED MAY 16, 2000

OFFICE OF STATE REVIEW
NEW YORK STATE EDUCATION DEPARTMENT

In the Matter of Appeal of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Petitioner,

From a Hearing Officer's Finding of Fact and Decision Issued in the Matter of

GILBERT FRESTON, by his parent, TOM FRESTON,

Respondent

VERIFIED PETITION

Introduction

1. The parent initiated an impartial hearing seeking to obtain tuition reimbursement for the 1999-2000 school year, in accordance with the decision of the United States Supreme Court in *Florence County School District Four v. Carter*, for the unilateral placement of the student in the Stephen Gaynor School ("Gaynor"), a private, non-SED approved program.

Appendix D

2. Gilbert, born on October 1, 1989, has never attended a public school program.

3. For the 1999-2000 school year, the Committee on Special Education ("CSE") developed an Individualized Education Program ("IEP') for Gilbert, which recommended that he be classified learning disabled and receive special education services in a Modified Instructional Service ("MIS") 1 program with a student/ teacher ratio of 15:1.

4. The recommended placement was at P.S. 77[1] (the New York City Lower Lab School for Gifted Education), which is a public school located in Manhattan. However, Gilbert's parent continued to unilaterally place Gilbert at Gaynor for the 1999-1000 school year.

5. The impartial hearing officer held that the recommended placement was not appropriate for Gilbert for the 1999-2000 school year and that the unilateral private school placement at Gaynor was appropriate and the least restrictive environment.

6. The Impartial Hearing Officer's Findings of Fact and Decision ("Decision") should be reversed in its entirety.

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1. The public school number designation changed from P.5. 871 to P.S. 77 as of the 1999-2000 school year.

Appendix D

As And For A Statement Of Relevant Facts

7. Petitioner, the Board of Education of the City School District of the City of New York ("Board"), is a municipal corporation, created pursuant to Article 52-A of the New York State Education Law.

8. The Board, in accordance with the Individuals With Disabilities Education Act ("IDEA") and Article 89 of the New York State Education Law is responsible for providing a free appropriate public education ("FAPE") to New York City resident students, between the ages of 3 and 21, who have been classified as children with disabilities in need of special education programs and services.

9. Respondent, Tom Freston, is the parent of the student Gilbert Freston. (sometimes referred to as "the student") who has been classified by the CSE as a child with learning disability in need of a MIS 1 program combined with the related services of speech and language, and counseling. (Board Exhibit 3)

10. The parties have stipulated as to the appropriateness of the classification of learning disabled. (Decision at 2)

11. Gilbert, born on October 1, 1989, has attended Gaynor since kindergarten. Before attending Gaynor, Gilbert's only other school experience was in the Washington Market School, a small pre-kindergarten private school. (1/31/00 Tr. at 127-129)

Appendix D

12. In preparation for annual review for the 1999-2000 school year, the CSE conducted several updated evaluations, obtained current progress reports from Gaynor and reviewed existing evaluation reports.

13. On July 2, 1998, a social history was conducted. The parent reported that Gilbert takes Ritalin twice daily all year round. He further reported that Gilbert receives language therapy after school two times a week. The parent believes that Gilbert's problems center around his reading and distractibility. (Board Exhibit 4)

14. On September 25, 1998, a speech and language evaluation was conducted by the same evaluator who conducted the prior year's speech and language evaluation. Before testing began, Gilbert said that he did not take his medication that day, however, his mother reported that he did. During the evaluation, Gilbert had poor attention skills and was extremely overactive, restless and easily distracted. He also appeared tired and yawned often during the evaluation. The evaluator opined that these issues affected the results of Gilbert's testing. (Board Exhibit 7)

15. The evaluator reported that the assessments revealed variable linguistic functioning in receptive and expressive language abilities ranging from above average to mildly deficient and below average respectively. The evaluator recommended that speech and language services continue twice weekly in a group of three students. (Board Exhibit 7)

Appendix D

16. On January 28, 1999, a classroom observation was conducted. The class was a reading class with six children with one teacher and one assistant teacher. Gilbert entered from another class and although he did not have his homework sheet, he shared with another student. Gilbert participated in the activities of the lesson and was attentive when the other students were reading. There were no attention issues or restlessness noted by the observer. (Board Exhibit 10)

17. On April 10, 1999, an educational evaluation was conducted. The educational evaluator reported that the student was cooperative and friendly. He appeared to be tired and yawned several times. This evaluator reported that there were a few moments of distractibility, however, Gilbert was easily re-directed back onto task. (Board Exhibit 11)

18. The K-TEA was administered. The student's decoding skills were assessed at the middle 3rd grade level and spelling was at the middle to upper 3rd grade level. In reading comprehension, he scored at the middle 2rd grade level. In math applications he scored at the middle 3rd grade level and in math computation he scored at the early 4th grade level. (Board Exhibit I 1)

19. Also on April 10, 1999, a psychological evaluation was conducted. The evaluator reported that Gilbert was cooperative and compliant. He appeared to be tired and benefited from breaks. Be also responded well to praise and encouragement. (Board Exhibit 9)

Appendix D

20. The student scored overall in the upper end of the average range of intelligence with his verbal scale score in high average range. On the Bender Visual Motor Gestalt Test, Gilbert scored below average in the area of graphomotor and fine motor coordination. Some of his drawings indicate rotation joining difficulties and poor organization. (Board Exhibit 9)

21. Emotional testing demonstrated that Gilbert needs a lot of encouragement and praising. Continued counseling services were recommended to address self-confidence and self-esteem. (Board Exhibit 9)

22. On April 22, 1999, an occupational therapy assessment was conducted. The results demonstrated no areas of weakness. The evaluator determined that occupational therapy was not needed. (Board Exhibit 6)

23. On April 23, 1999, a medical examination was conducted which found no medical issues other than Gilbert's diagnosis of Attention Deficit Disorder. (Board Exhibit 14)

24. On April 30, 1999, a speech and language evaluation was conducted. This evaluation demonstrated that Gilbert presents with normal expressive and receptive language skills. The only area noted to be in the low average range was in the area of sentence assembly, however, with cued words he was able to formulate complex sentences. This evaluator did not recommend speech and language services. (Board Exhibit 8)

Appendix D

25. A 1998-1999 mid year report from Gaynor was submitted and reviewed by the CSE. It showed Gilbert to be functioning at approximately an early 2nd grade level in independent reading and middle 2nd grade level in instructional reading. His reading comprehension was at approximately the middle 2nd grade level while his listening comprehension skills were at approximately a late 2nd grade level and spelling was at approximately a middle 2nd grade level. (Board Exhibit 12)

26. The Gaynor mid year report indicated that Gilbert was at approximately the early 3rd grade level in math. No deficits were noted in the area of perceptual functioning. In the area of following directions, it was noted that Gilbert followed directions with ease when focused. Gilbert's listening skills were also good when he was focused. With respect to oral language and communication, it was noted that Gilbert exhibited word retrieval difficulties and can be disorganized in his language. (Board Exhibit 12)

27. A CSE meeting was initially scheduled for May 28, 1999. However, due to the unavailability of the parent member, the meeting was rescheduled to June 23, 1999. (Board Exhibit 13 and 1/31/00 Tr. at 139-142)

28. On June 23, 1999, a CSE meeting was held for the purpose of recommending an appropriate education placement for the 1999-2000 school year. In attendance were the parent, district representative, general education teacher, law clerk from the office of parent's

attorney, special education teacher, parent member, and school psychologist. (Board Exhibit 3)

29. The CSE determined that the student required a MIS 1 program, which is a self-contained special class setting with a ratio of a maximum of 15 students to 1 teacher, combined with testing modifications, speech and language services twice weekly, and counseling services one time a week. (Board Exhibit 3)

30. The CSE attempted to contact the special education teacher from Stephen Gaynor, but was informed that there was no one who could participate in the review. (1/21/00 Tr. at 20)

31. A placement at P.S. 871 located at 1700 3rd Avenue, New York, New York, was offered by Final Notice of Recommendation sent to the parent on July 29, 1999. (Board Exhibit 1) The name of the school changed in the 1999-2000 school year from P.S. 871 to P.S. 77. It is also called the New York City Lower Lab School for Gifted Education. (2/29/00 Tr. at 199)

32. The parent unilaterally placed the student at Gaynor for 1999-2000 school year.

33. Thereafter, the parent requested an impartial hearing. The hearing was held on January 21, 2000, January 31, 2000 and February 29, 2000. (Decision at 1)

34. The Board was represented by an attorney and presented testimony from the Special Education Teacher of the

Appendix D

MIS 1 program at P.S. 77, the CSE School Psychologist who conducted the classroom observation, and the CSE Special Education Teacher.

35. The parent was represented by an attorney and presented testimony from three Gaynor teachers, himself, and the attorney's law clerk who attended both scheduled CSE meetings.

36. The psychologist who participated in Gilbert's IEP review for the 1998-1999 school year as well as the 1999-2000 school year, and conducted the classroom observation testified in support of the CSE recommendation at the hearing. (1/21/00 Tr. at 8-9)

37. The psychologist testified that the results of the evaluation showed a child who is friendly, pleasant and on the quiet side. With respect to the intellectual testing, Gilbert demonstrated relative strengths in the area of verbal abstract reasoning and general fund of information and being able to sequence. There were no relative weaknesses. (Board Exhibit 9, 1/21/00 Tr. at 9-10) With respect to perceptual motor development, Gilbert scored below average. With respect to the emotional testing, Gilbert demonstrated need in the area of self-confidence and self-esteem and that he has difficulty verbalizing his feelings. (1/21/00 Tr. at 10)

38. The CSE psychologist further testified that the findings of the psychological evaluation were consistent with the Gaynor mid year teacher report. (1/21/00 Tr. at 12)

Appendix D

39. He further testified with respect to the classroom observation. Overall Gilbert participated in the class activities, he was appropriate in the group and seemed to be very attentive to what was going on in the class. (1/21/00 Tr. at 16 and 41-44)

40. He testified that Gilbert needed a self-contained class where his issues of attention and academic weaknesses could be address. In addition, counseling was recommended to address issues of self-confidence and self-esteem. (1/6/00 Tr. at 21-22)

41. The educational evaluator who participated at the CSE review in the capacity of the special education teacher member testified at the hearing in support of the CSE recommendation of a MIS 1 program.

42. The CSE special education teacher member testified that she holds a New York State certification to teach special education and reading. She has a Bachelor of Arts with a concentration in education and a Masters Degree in the field of education with a concentration in the area of reading. (1/21/00 Tr. at 58-59)

43. She testified that she has expertise in the types of instruction children with disabilities need and in decision regarding an appropriate placement. (1/21/00 Tr. at 100)

44. At the hearing, she testified that Gilbert's presenting problem is most prominent in the area of reading, particularly reading comprehension. Math was an area

of strength, especially in numeric calculations; however, he had some difficulty in the area of problem solving. (1/21/00 Tr. at 60-66)

45. The special education teacher opined that the results of the educational evaluation were similar to information provided in the teacher report from Gaynor. (1/21/00 Tr. at 66) In addition, the teacher report from Gaynor described Gilbert as having attention issues. It was noted that his work improves when he is focused. Also the teacher report noted that Gilbert was not very verbal. (1/21/00 Tr. at 66-68)

46. The special education teacher member testified that although the speech and language evaluation recommended no services, the team was concerned about the results of some of the sub tests of the evaluation. Gilbert's scores were low in the area of listening comprehension and oral narrative. Both are of these skills are important in a classroom setting, therefore the CSE team recommended speech and language services. (1/21/00 Tr. at 69-71)

47. In her opinion, a MIS 1 program would be appropriate to meet Gilbert's learning disability and attention issues because the special education teacher would use multi sensory methods of instruction. She opined that Gilbert needs the smaller class size with a trained special education teacher to address his attention issues. (1/21/00 Tr. at 73-74)

48. She further opined that a self-contained private school would have been too restrictive because there is no reason why Gilbert could not be with non-disabled peers during non-academic activities. (2/1/00 Tr. at 83-84)

49. The special education teacher of the recommended MIS 1 class at P.S. 77 testified on behalf of the Board in support of the appropriateness of the recommended MIS 1 program for the student.

50. The teacher testified that she is certified in the areas of elementary education and special education. She has taught special education for about five years. She is familiar with Gilbert through a review of his IEP. (2/29/00 Tr. at 198) The school is large with two schools within one building. The smaller school is P.S. 77, which contains kindergarten through fifth grade classes. There is only one MIS 1 class in the school and there are other special education services in the school such as consultant teacher services. The MIS 1 class is located next to and across the hall from two general education fourth grade classes. (2/29/00 Tr. at 199-200)

51. There are nine students currently in her class with one teacher and a student teacher from New York University. The children are between the ages of about nine and ten years old with one child who is eight years old. (Tr. at 200-201).

52. The functioning levels of the students in reading range from about high kindergarten level to high third grade. The functioning levels of the students in math range

from about high kindergarten to fourth grade. (2/29/00 Tr. at 202 and 218)

53. To address the range of reading levels the teacher practices private reading and has individualized reading groups based upon the students' instructional reading levels. The reading program is a balanced literacy program, which includes read aloud, interactive writing, shared reading, guided reading, and writer's workshop. Most of these activities happen daily. (2129/00 Tr. at 203-204)

54. In math, the majority of the students are functioning between the 2nd and 3rd grade level, with one child functioning at the fourth grade level. Be is currently mainstreamed for math. The class participates in the math curriculum, which is a hands-on curriculum called the Turk program. The children work in pairs or they work independently to solve problems. The students meet in a circle to discuss strategies used and different strategies available in solving problems. The class also did a unit on telling time, as this was an area of need for the class. (2/29/00 Tr. at 202, 206 and 218-220)

55. The MIS 1 teacher testified that the students have similar needs as Gilbert including needing speech and language and counseling services. (2129/00 Tr. at 207-208)

56. The MIS 1 teacher testified that based upon her review of Gilbert's IEP, it is her opinion that she would have had an appropriate placement for him for the 1999-2000 school year. (2/29/00 Tr. at 211)

Appendix D

57. The speech and language pathologist from Gaynor testified that Gilbert has expressive and receptive delays requiring speech and language services. (2/29/00 Tr. at 229-230)

58. On cross examination, the Gaynor speech and language pathologist admitted that she never conducted a speech and language evaluation nor seen any speech and language evaluation conducted by the CSE. (2129/00 Tr. at 233-234)

59. The Gaynor reading teacher testified that Gilbert has difficulty with reading comprehension and that she provides reading sessions in a group of two once a week. It is her opinion that Gilbert needs this level of reading services (2/29/00 Tr. at 242-243)

60. The Gaynor head teacher of Gilbert testified that Gilbert's class consists of eight students, all boys with one teacher and an assistant. (1/31/00 Tr. at 148-150) In her opinion the IEP is "on target" and Gaynor is addressing Gilbert's needs and goals as described in the IEP. However, with respect to the class size of 15 to 1, she opined that the class would be overwhelming for Gilbert partly because it takes him a long time to warm up and trust any teacher. (1/31/00 Tr. at 158)

61. She further testified that Gilbert's teacher was in the hospital on June 23, 1999, the day of the IEP meeting. (1/31/00 Tr. at 162)

Appendix D

Impartial Hearing Officer's Decision

62. The impartial hearing officer held that the recommended MIS 1 placement was not appropriate to meet Gilbert's educational needs and ordered the Board to reimburse the parent for the cost of the tuition at Gaynor for the 1999-2000 school year.

63. The impartial hearing officer based his determination that the MIS 1 program and placement was not appropriate on two findings: (1) he found the IEP to be defective procedurally because Gilbert's actual special education teacher from Gaynor did not attend the IEP review meeting held on June 23, 1999; and (2) he found that Gilbert's functioning level in math is too high for him to be appropriately grouped in the recommended class.

As And For A First Affirmative Claim

The Decision Should Be Reversed On The Grounds That There is Substantial Evidence to Establish That The Recommended MIS 1 Program Was Appropriate To Meet The Student's Educational Needs

64. A parent who unilaterally places his or her child in a private non-SED approved school may be entitled to tuition reimbursement if the public school district did not offer an appropriate placement. Such a public placement is appropriate if it is reasonably calculated to enable [the student] to receive educational benefits. *Bd of Ed. Hendrick Hudson CSE v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*")

Appendix D

65. The Individuals with Disabilities Education Act ("IDEA") "guarantees . . . an 'appropriate' education, not one that provides everything that might be thought desirable by loving parents.'" *Walczak v. Florida Union Free Sch. Dist.* 142 F.3d 119, 131 (2d Cir. 1998) (quoting *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.3d 563, 567 (2d Cir. 1998).

66. The evidence introduced at hearing established that the recommended MIS 1 program, combined with the related services of speech and language and counseling, would have been appropriate for Gilbert for the 1999-2000 school year.

A. *The IHO's Determination That The IEP Meeting Was Not Properly Constituted Rendering The Entire Recommendation A Nullity Is Incorrect.*

67. The Board cannot compel a child's private school teacher to attend an IEP meeting. Accordingly, the Board may designate a teacher to participate in the child's IEP meeting to act in the capacity of the special education teacher member if such teacher is qualified to provide special education in the area of the child's disability. *Application of a Child With a Disability*, State Review Officer Appeal No. 96-18 ("SRO 96-18").

68. The IHO incorrectly found that this SRO decision is no longer valid on the grounds that it predates revisions made to the composition of the IEP team by the 1997 reauthorization of the Individuals with Disabilities Education Act ("IDEA"). Those revisions do not affect the continued validity of SRO 96-18.

Appendix D

69. First, a review of the 1997 revision of the requirement for the participation of a special education teacher as a member of the IEP team does not indicate that the requirement has been altered, in any substantive way, from that which existed prior to the reauthorization.

70. Secondly, the revision does not preclude the application of SRO 96-18, for reason that it does not vitiate the underlying rationale for the SRO's determination.

71. Although the private school teachers are regularly invited to, and do participate, at IEP review meetings, they have no legal obligation to attend and can absent themselves for any reason and without prior notice.

72. To hold that their participation is absolutely required places the conduct of any IEP meeting within their control. This, as recognized implicitly by the SRO, cannot be the intent of the IDEA. In fact, it is clear that the IDEA places responsibility for the day-to-day operation of IEP meetings within the control of the local education agency. 34 CFR §300.344(a)

73. Furthermore, it is unreasonable to require **without exception** the presence of the child's actual special education teacher at the IEP meeting.

74. The efficient and appropriate conduct of IEP meetings concerning students who attend private schools requires a reasonable alternative means of complying with the procedural requirement of ensuring the participation of a special education teacher.

75. In the case at hand, the CSE contacted Gaynor but was informed that there was no one available to participate in the review, presumably because the school is closed during the summer.

76. In addition, it was later learned at the hearing that the Gaynor teacher was in the hospital at the time of the IEP meeting. Therefore, whether or not Gaynor was in session during the summer, the teacher was unavailable to participate in the IEP review meeting.

77. Under the circumstances, it was reasonable and appropriate for the CSE to designate a special education teacher qualified to teach in the area of the child's disability to participate at Gilbert's IEP meeting in the capacity of special education teacher member.

78. Based upon the foregoing reasons, the IEP meeting was properly constituted and procedurally compliant with the provisions of the IDEA.

B. *The Testimony Of The Special Education Teacher Of The Recommended MIS 1 Program Established That The Functional Grouping Of The Recommended Class Was Appropriate To Meet the Student's Educational Needs.*

79. With respect to the impartial hearing officer's determination that the proposed MIS 1 program would not have been challenging academically, the special education teacher of the prospective MIS 1 program provided sufficient evidence as to how Gilbert's academic needs would have been addressed.

Appendix D

80. In general, the proposed MIS 1 class contains nine students with one special education teacher (in addition, a student teacher from New York University is present three days a week). The majority of students are nine to ten years old, and one student is eight years old.

81. Specifically, the hearing officer incorrectly determined that the functioning levels of the students in the area of math were too dissimilar to Gilbert's level, making the class inappropriate for Gilbert.

82. The MIS 1 teacher testified that in math, the students' functioning levels range from high kindergarten to third grade, with one child functioning at the fourth grade level who is mainstreamed for math in a general education class.

83. The MIS 1 teacher testified that the majority of the students are functioning at the second to third grade levels in math.

84. Contrary to the hearing officer's description of Gilbert's functioning level in math, Gilbert scored in the middle third grade level in math applications and the early fourth grade in math computation. Therefore, Gilbert's overall math score is approximately at the high third grade level.

85. Based upon his overall functioning level in math, Gilbert would be within the range of the majority of the students in math.

86. The MIS 1 teacher testified that based upon her review of Gilbert's IEP, she feels that academically Gilbert would fall at the higher end of her class, but that there are students who are at his academic level in her class.

87. She further opined that her class is an appropriate placement for Gilbert.

88. In addition, the hearing officer incorrectly presumed that because the school is called the New York Lower Lab School for Gifted Education, there would be no appropriate opportunity for mainstreaming for Gilbert in math.

89. The MIS 1 teacher testified that the child in her class who is functioning at the fourth grade level in math currently is mainstreamed for math in the general education program. If appropriate, such an approach in math would also be available for Gilbert in the recommended placement.

90. Contrary to the hearing officer's presumption, the MIS 1 teacher specifically testified on cross examination that despite the school being called the Lower Lab School for Gifted Education, the general fourth grade class is doing fourth grade level work.

91. She testified that the education is gifted in that in math the school uses the "Turk" program, which is a hands-on approach where students discuss their strategies for math, but that the fourth grade work is the same as a general education fourth grade work district-wide. The

hearing officer's presumption that the pace of the work would be faster than usual is unsupported by the evidence.

92. For the foregoing reasons, the hearing officer's decision should be reversed in its entirety.

As And For A Second Affirmative Claim

As A Matter Of Equity, The Tuition Reimbursement Should Be Denied On the Grounds Thai The Parent Had No Intention Of Placing Gilbert In A Public School Program Irrespective Of Its Appropriateness.

93. Effective on or about June 1, 1997, the Individuals with Disabilities Education Act ("IDEA") was reauthorized. Added to the IDEA was a provision that specifically addressed a parent's right to seek tuition reimbursement from a private school. 20 U.S.C. §1412(a)(10)(C)(ii) and (iii).

94. The newly enacted provision specifically limited tuition reimbursement to "parents of a child with a disability, **who previously received special education and related services under the authority of a public agency**." 20 U.S.C. §1412(a)(10)(C)(ii) (emphasis supplied).

95. The language of the new IDEA clearly presumes that the child attended a public school special education program.

Appendix D

96. Further, the Supreme Court in *Burlington/Carter* established a tripartite test that included a review *of* equitable considerations prior to an award of tuition reimbursement.

97. The hearing officer found that the parent "did not seem to have particular interest in the public school site in question." (Decision at 13)

98. Here, we contend that the student never received special education service by a public agency and that the parent had no intention of placing Gilbert in a public school program.

99. Accordingly, an award of tuition reimbursement, as a matter of equity, should be barred.

Wherefore, for the foregoing reasons the Board respectfully requests that the Decision be reversed in its entirety and a determination be made that the Board's recommended placement for the 1999-2000 school year was appropriate.

Dated: May 16, 2000

Respectfully submitted,

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110 Livingston Street, Rm. 920
Brooklyn, New York 11201
(718) 935-3611

APPENDIX E — VERIFIED ANSWER, DATED AUGUST 30, 2000

STATE REVIEW OFFICER
NEW YORK STATE EDUCATION DEPARTMENT

In the Matter of the Appeal of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

From a Hearing Officer's Findings of Fact and Decision issued in the matter of

GILBERT FRESTON, by his parent, TOM FRESTON,

Respondent.

Respondent, Tom Freston by his attorney, NEAL H. ROSENBERG, hereby answers the verified petition and respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations sat forth in paragraph "1" of the petition.

2. Admits the allegations contained in paragraphs "2", "3", "4" and "5" of the petition.

3. Denies the allegations contained in paragraph "6" of the petition.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "7", "8", "9" and "10" of the petition.

5. Denies the allegations contained in paragraphs through "11" through "61" of the petition and respectfully refers the State Review Officer to the exhibits entered and the transfer of the hearing for a complete record.

6. Admits the allegations contained in paragraphs "62" and "63" of the petition and respectfully refers the State Review Officer to the Impartial Hearing Officer's decision fax the full meaning thereof.

7. Denies the allegations contained in paragraphs "64" borough "78" of the petition.

8. Denies the allegations set forth in paragraphs "79" through "92" of the petition and respectfully refers the State Review Officer to the exhibits entered and the transcript of the hearing for a complete record.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "93" through "99".

10. Petitioner alleges that the Impartial Hearing Officer properly determined that the placement offered by the Board of Education was both procedurally and substantially inappropriate to offer an educational benefit to the child.

11. Petitioner alleges that the I.E.P. was not sufficiently specific and that the goals were net appropriately measurable.

Appendix E

12. Petitioner alleges that the Respondent Acted in good faith throughout the process end demonstrated the appropriateness of reimbursement as the appropriate remedy.

13. Petition alleges that the CSE meeting was invalid in that the goals were written in advance of the meeting and were not reviewed at the meeting.

14. Petitioner alleges that the review process must have some semblance of a timeline.

15. Petitioner alleges that the Board of Education must have a teacher familiar with the child at the meeting if at all possible and in this case the teacher's inability to attend was caused solely by the Petitioner's delay.

16. Petitioner alleges that the children in a Board of Education class must function within a three year age span.

17. Petitioner alleges that the testimony of the child's teacher, the school's speech and language pathologist and the reading specialist detail the needs and resultant techniques utilized so that as appropriate educational benefit is received by the child.

18. Petitioner alleges that his son requires the intense structured remediation he receives in reading, math and speech and language.

19. Petitioner alleges that his child requires and receives the use of a computer because of his frustration in writing.

This being especially relevant in light of the fact that although the Petitioner's education evaluation recommended giving the child the use of a computer. However, this recommendation was ignored by the committee because it was not allegedly corroborated by the occupational therapist or the teacher.

20. Petitioner alleges that his child's ADHD requires a small class/small school environment.

21. Petitioner alleges that the progress his child has made at the Gaynor School is clearly measurable. (T. pp. 130-131)

22. Petitioner alleges that both on procedural as well as substantive grounds the Petitioner's demand for a reversal of the impartial hearing officer's decision should be denied and that in light of Gilbert's need for small classes and individualized attention, Gaynor was an appropriate educational environment for him and he received an educational benefit.

Therefore, the decision of the hearing officer should be upheld in all respects.

Dated: New York, New York
August 30, 2000

Appendix E

Respectfully submitted

NEAL HOWARD ROSENBERG
Attorney for Respondent
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New York, New York 10007
(212) 732-9450

To: BOARD OF EDUCATION OF THE
CITY OF NEW YORK
LAW DEPARTMENT
110 Livingston Street
Brooklyn, New York 11201

APPENDIX F — DECISION OF THE STATE REVIEW OFFICER, DATED MARCH 30, 2001

UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
STATE REVIEW OFFICER

No. 00-031

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Hon. Michael D. Hess, Corporation Counsel, attorney for petitioner, Alexandra Michalos, Esq., of counsel

Neal H. Rosenberg, Esq., attorney for respondent

DECISION

Petitioner, the Board of Education of the City School District of the City of New York, appeals from an impartial hearing officer's decision which ordered it to reimburse respondent for the cost of his son's education at the Stephen Gaynor School (Gaynor) for the 1999-2000 school year. The appeal must be dismissed.

Respondent's son was ten years old and in the equivalent of the fifth grade at Gaynor at the time of the hearing. He

has attended Gaynor since kindergarten. Gaynor has not been approved by the New York State Education Department to provide education to children with disabilities. The record is limited with respect to the student's history with petitioner's Committee on Special Education (CSE), but does indicate that the student has been classified by the CSE as learning disabled. His classification is not in dispute in this proceeding.

A speech/language evaluation was conducted in September 1998 when the student was in the fourth grade and nearly nine years old (Exhibit 7). Based upon a July 1998 social history (Exhibit 5), the speech/language pathologist noted that the boy took Ritalin twice per day. Although he had reportedly taken his morning dose of Ritalin prior to the evaluation, the student nevertheless exhibited poor attending skills and a short attention span during the evaluation. The evaluator reported that the boy's significant attention problems affected his ability to perform, even with frequent breaks to accommodate his behavior. The speech/language pathologist further reported that the student's linguistic functioning ranged from below average to significantly above average. When he was not focused and not attending, the student had difficulty organizing, integrating and remembering stimuli presented orally. The speech/language pathologist noted that the student's performance was above average when information was concrete and pictorial clues were provided. However, as the information became more complex and visual clues were not supplied, the student's attending skills deteriorated and his performance weakened. The student's expressive language skills were variable. He demonstrated difficulty in planning and producing sentences

for conversation and narratives. He also had difficulty organizing his thoughts in a logical precise manner. The speech/language pathologist recommended that the student receive speech/language therapy twice per week for 30 minutes.

In a 1998-99 midyear progress report, Gaynor reported that the student's reading comprehension and spelling skills were at approximately a 2.5 grade level and his mathematics skills were at a 3.0 grade level (Exhibit 12). The progress report also revealed that the student performed best on writing tasks when structure was provided. The student was described as not being particularly verbal because he preferred to use gestures or actions to communicate. He also exhibited word retrieval difficulties, and was disorganized in his language. The report further indicated that the student sometimes became silly, and had difficulty transitioning from free time to an academic activity.

One of petitioner's school psychologists observed the student in his reading class in January 1999 (Exhibit 10). The student was able to respond to questions about a book the class was reading. He also was able to read a passage aloud, although he had difficulty with two words. The school psychologist noted that the student actively participated during the entire period and was attentive when his classmates were reading.

In an educational evaluation conducted on April 10, 1999 (Exhibit 11), the student achieved grade equivalent scores of 2.5 for reading comprehension, 3.5 for reading decoding, 3.7 for spelling, 4.2 for math computation, and 3.6 for math

application on the Kaufman Test of Educational Achievement (KTEA). The educational evaluator noted that the student's greatest skill deficit was in reading comprehension and she recommended teaching the student more strategies and providing practice through drills and repetition to make reading a more fluent activity. On an informal writing sample, the student's writing was labored and simple. He did not use descriptive or enriched vocabulary. The educational evaluator suggested the use of a computer to increase productivity. She also suggested that the student maintain a daily log to increase his vocabulary, sentence construction and idea development.

A psychological evaluation was conducted on April 10, 1999 (Exhibit 9). The student achieved a verbal IQ score of 110, a performance IQ score of 104, and a full scale IQ score of 107 on the Weschler Intelligence Scale for Children – III (WISC-III), placing him in the upper end of the average range of intellectual functioning. The student's graphomotor and fine motor functioning were below average. Projective testing revealed that he was very sensitive, sometimes fragile, and had difficulty verbalizing his feelings. The psychologist noted that the student required much encouragement and praise in order to perform successfully at his intellectual potential. He recommended that a speech/language evaluation be conducted. He further recommended that the student remain in counseling to build his self-confidence and self-esteem.

An occupational therapist who assessed the student on April 22, 1999 reported that he did not need therapy (Exhibit 6). A speech/language pathologist who evaluated the student on April 30, 1999 recommended that he not receive therapy (Exhibit 8). She noted that although the student had exhibited

some difficulty responding to questions based on orally presented paragraphs and sentence assembly, his expressive and receptive language skills were in the normal range. A medical documentation form completed in April 1999 indicated that the student had been diagnosed as having an attention deficit disorder (Exhibit 14).

The CSE was initially scheduled to meet on May 28, 1999. However, the meeting was postponed because the parent member was unavailable. The CSE reconvened on June 23, 1998. No one from Gaynor was available to participate at the meeting, however, one of petitioner's educational evaluators was designated to serve as the special education teacher member of the CSE. The CSE developed an individualized education program (IEP) for the student for the 1999-2000 school year (Exhibit 3). It recommended that he continue to be classified as learning disabled, and that he be placed in a modified instructional services – 1 (MIS-I) program with a student : teacher ratio of 15:1. The CSE further recommend that the student receive speech/ language therapy in a group twice per week and counseling in a group once per week. A final notice of the CSE's recommendation was sent to respondent on July 29, 1999, in which the boy's parent was offered a specific placement at PS 871, which is also called the New York City Lower Lab School for Gifted Education (Exhibit 1). The record shows that the school's designation changed from PS 871 to PS 77 commencing the 1999-2000 school year.

Respondent disagreed with the recommended placement, and requested an impartial hearing. The hearing was held on January 21, 31 and February 29, 2000. The hearing officer

rendered his decision on April 6, 2000. He determined that the CSE was invalidly composed because the student's special education teacher from Gaynor was not present at the June 23, 1999 meeting. Additionally, the hearing officer questioned whether the student would have been appropriately grouped for math in the proposed MIS-I program. He also questioned whether mainstreaming the student for math was considered as an alternative, and whether it was a viable option. The hearing officer concluded that petitioner had failed to offer an appropriate program, and that Gaynor had provided an appropriate program to the student. Accordingly, the hearing officer found that respondent was entitled to an award of tuition reimbursement.

The Board of Education appeals from the hearing officer's decision on several grounds. Initially, it argues that the hearing officer incorrectly determined that the CSE was improperly constituted, thereby nullifying its recommendation for the student's program and placement during the 1999-2000 school year. The Board of Education asserts that when a parent has placed his child in a private school, it is not required to have a teacher from that school participate in the student's IEP meeting as the student's special education teacher. Instead, it argues that it may designate one of its educational evaluators to serve as the student's special education teacher at the meeting, if the evaluator is qualified to provide special education in the area of the student's disability.

The Board of Education relies upon the decision in *Application of a Child with a Disability,* Appeal No. 96-18. The hearing officer found that the decision upon which the

Board of Education relies was no longer controlling because it had been premised upon a footnote to the former 34 C.F.R. § 300.344. That regulation was replaced in May 1999 by the new regulations implementing the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97). I agree with the hearing officer that the regulation in question has been superseded by the May 1999 regulations. However, I disagree with his conclusion that the 1997 amendments to the IDEA or their implementing regulations require that the student's special education teacher at the private school attend the IEP meeting.

The IDEA '97 requires that at least "one special education teacher, or where appropriate, at least one special education provider of such child" participate in the meeting at which the student's IEP is developed (20 U.S.C. § 1414[d][1][B][iii]). The implementing regulation requires that an IEP team include at least "one special education teacher of the child, or if appropriate at least one special education provider of the child" (34 C.F.R. § 300.314[a]). The new regulation does not include the language of the former regulation's footnote authorizing a board of education to designate the teacher member of the CSE in certain circumstances. In its official interpretation of the new IDEA regulations, the U.S. Department of Education has indicated that "the special education teacher or provider of the child who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP" (See Appendix A to Part 300—Notice of Interpretation, Question 26).

Appendix F

The record shows that one of petitioner's educational evaluators was designated to serve as the special education teacher member of the CSE. At the hearing, the evaluator testified that she was certified by the State Education Department to teach special education, reading, and common branch subjects (Transcript p. 59). She was therefore qualified wider state law to teach respondent's son. However, the educational evaluator was not the student's current special education teacher, nor was she expected to be his special education teacher for the 1999-2000 school year.

As interpreted by the U.S. Department of Education, the new regulation offered the Board of Education three options in selecting an individual to serve as the student's special education teacher on the CSE. It could have had the student's private school teacher serve as the special education teacher member of the CSE. In the alternative, the special education teacher on the CSE could have been a special education teacher who would have been likely to implement the student's IEP. The third option would have been for the student's speech/language therapist to serve as the special education teacher member of the CSE.

A board of education cannot reasonably be expected to designate a teacher who will necessarily be a student's special education teacher to serve on a CSE before the CSE has determined what special education services should be provided to the student Nevertheless, it can be expected to have sufficient information about the student to ascertain what program or programs might be appropriate for the student, and to designate a special education teacher who is not only licensed or certified to teach in such programs, but

is also teaching in one of those programs. When apprised of the nature of the student's disability, such a teacher could provide significant guidance to the CSE about the student's ability to successfully function in those programs with appropriate support services. Petitioner's evaluator testified that she had taught in private schools before becoming an employee of the Board of Education. However, she had no personal knowledge of the student, and only general knowledge of the program recommended by the CSE. Under the circumstances, I must find that the educational evaluator could not serve as the student's special education teacher on the CSE since she could not provide the kind of knowledge of the student or the recommended program that I must assume was intended by the IDEA '97 and its regulations.

A board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (*Application of a Child with a Disability,* Appeal No. 93-9; *Application of a Child with a Handicapping Condition,* Appeal No. 92-7; *Application of a Handicapped Child,* 22 Ed Dept Rep 487 [1983]). I must find that the Board of Education has not met its burden of proof because of its failure to have a validly constituted CSE. As petitioner well knows, the recommendation of a CSE which did not include each of the required members is a nullity (*Application of a Child with a Handicapping Condition,* Appeal No. 91-41; *Application of a Child with a Handicapping Condition,* Appeal No. 90-16). Having determined that the Board of Education failed to demonstrate the appropriateness of its recommended program, it is not necessary that I address its other challenges to the hearing officer's findings regarding grouping and mainstreaming.

Appendix F

A board of education may be required to pay for educational services obtained for a student by his or her parent if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (*Burlington School Comm. v. Dept of Educ.*, 471 U.S. 359 [1985]). The failure of a parent to select a program known to be approved by the state in favor of an unapproved option is not itself a bar to reimbursement (*Florence County School Dist. Four v. Carter,* 510 U.S. 7 [1993]). I find that respondent has prevailed with respect to the first criterion for an award of tuition reimbursement because the Board of Education could not demonstrate the appropriateness of the CSE's recommendation.

A student's parent bears the burden of proof with regard to the appropriateness of the services selected (*Application of a Child with a Disability,* Appeal No. 95-57; *Application of a Child with a Disability,* Appeal No. 94-29; *Application of the Board of Educ.*, Appeal No. 93-34). In order to meet that burden, the parent must show that the private school offered an educational program which met the student's special education needs (*Application of a Child with a Disability,* Appeal No. 94-29). The private school need not employ certified special education teachers, nor have its own IEP for the student (*Application of a Child with a Disability,* Appeal No. 94-20).

The hearing officer found that there was more than sufficient evidence demonstrating that the program at Gaynor was suiting the student's needs and providing him with an appropriate education. He noted that the student made progress at Gaynor and that the progress could be traced to

Gaynor's thorough reading program. Although the Board of Education seeks to have the hearing officer's decision reversed in its entirety, it has not challenged the hearing officer's finding that the educational services which Gaynor provided to respondent's son were appropriate for the student. Absent a specific challenge to that finding, there is no reason for me to review it. Accordingly, I find that respondent has prevailed with respect to the second criterion for an award of tuition reimbursement.

The third criterion for an award of tuition reimbursement is whether the parent's claim is supported by equitable considerations. The Board of Education contends that respondent is barred from receiving an award of tuition reimbursement because his son has not received special education services from a public agency. It relies upon the provisions of 20 U.S.C. § 1412(a)(10)(C)(ii). Petitioner's argument has been considered and rejected in prior appeals (*Application of a Child with a Disability,* Appeal No. 00-008; *Application of a Child with a Disability,* Appeal No. 98-4). I reach the same conclusion in this appeal. I also note that there is no indication in the record that respondent failed to cooperate with the CSE. Accordingly, I find that equitable considerations support the parent's claim and that he is entitled to reimbursement for the cost of his son's tuition at Gaynor for the 1999-2000 school year.

THE APPEAL IS DISMISSED.

s/ Robert G. Bentley
ROBERT G. BENTLEY

Dated: Albany, New York
March 30, 2001

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN FRANK G., *et al.* v. BOARD OF EDUCATION OF HYDE PARK CENTRAL SCHOOL DISTRICT, DECIDED JULY 27, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: August 3, 2005 Decided: July 27, 2006)

Docket No. 04-4981-cv

FRANK G. and DIANNE G., Parents of a Disabled Student, ANTHONY G.,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HYDE PARK CENTRAL SCHOOL DISTRICT,

Defendant-Appellant.

Before POOLER, SOTOMAYOR, Circuit Judges, and KORMAN, District Judge.*

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* The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix G

KORMAN, District Judge.

This appeal arises out of the efforts of the parents of a learning disabled child to obtain reimbursement for the private school tuition they incurred as a result of the failure of a local educational agency to provide him with a free appropriate public education. Specifically, defendant-appellant Board of Education of Hyde Park Central School District ("School District") appeals from a judgment of the United States District Court for the Southern District of New York (Brieant, J.) finding that the School District had failed to provide the learning disabled child of plaintiff-appellees Frank and Dianne G. a free appropriate public education as defined under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 et se. The School District argues that the district court erred in awarding plaintiff's reimbursement for tuition and attorneys' fees because, under the IDEA, Anthony's enrollment in private school was not appropriate and because the IDEA, 20 U.S.C. § 1412(a)(10)(C), permits reimbursement only where a child has previously received special education and related services. For the reasons stated below, we disagree with the School District's arguments and affirm the decision of the district court.

FACTUAL BACKGROUND

Frank and Diane G. are the adoptive parents of Anthony, who was born to a crack-addicted mother on May 21, 1991. Since the age of three, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). During the 1997-98 school year, Anthony attended kindergarten at the Randolph School, a private school in Wappingers Falls,

New York. From 1997 to 2001, Anthony completed first through fourth grade at Bishop Dunn School, a private school in Newburgh, New York. While Anthony did well at Bishop Dunn initially, as he progressed from first through fourth grade, his performance worsened in relation to the increasingly challenging academic environment and bigger class sizes he faced. In April 2000, in response to notification from Anthony's parents, the Committee on Special Education ("CSE") of the School District classified Anthony as learning disabled under the IDEA, Article 89 of the New York Education Law, and Part 200 of Title 8 of the Regulations of the Commissioner of Education.

During the spring of 2001, Anthony was evaluated by School District personnel. An occupational therapy evaluation conducted on February 1, 2001, revealed deficits in visual memory and visual sequential memory skills. The evaluator recommended that Anthony receive group occupational therapy twice a week. A Key Math Assessment administered on March 9, 2001, revealed severe deficiencies in subtraction and problem solving, and below average skills in rational numbers and in areas involving multi-step applications. During an in-class behavioral assessment, Anthony was observed engaging in a significant amount of off-task behavior.

An independent neuropsychological evaluation was conducted during the spring and early summer of 2001 by Dr. Miriam Lacher. She administered a standardized individual achievement test to Anthony, during which she observed him engaging in negative self-evaluations and experiencing difficulty formulating responses, shifting tasks,

absorbing directions, and taking into account the important aspects of situations. Among her detailed recommendations, Dr. Lacher recommended that Anthony receive "individualized attention and a relatively small class," concluding that "[s]ince his current class size appears too large, consider dropping [him] down to a class of 12, with an aide to assist." Dr. Lacher also noted that Anthony's social skills would be most effectively addressed in a group setting, that his teacher should "[k]eep directions brief and simple," that he would "do best in 'old fashioned' home and school settings that stress values around control and provide routine, structure, discipline, and consistency as well as warmth." She also recommended, *inter* alia, that Anthony receive occupational therapy, social skills training in a group setting, and continued counseling.

On August 8, 2001, the CSE reviewed Anthony's performance from the previous year and developed an independent education plan ("IEP") for the 2001-02 school year. The CSE recommended placement in a regular education class of 26 to 30 students at the Ralph R. Smith Elementary School ("Smith School"), a public school within the School District, as well as direct consultant teacher services for math and organizational skills, a full-time individual aide, and related services of counseling, group occupational therapy, a behavior modification program, and testing modifications. The CSE also observed that Anthony was dually enrolled at Bishop Dunn for the 2001-2002 school year.

On August 10, 2001, Diane G. wrote to the School District and requested an impartial hearing to reconsider the

Appendix G

CSE's recommendation that Anthony receive special education services at the Smith School and asked that the CSE instead provide these services at Bishop Dunn. She emphasized that the Smith School's class size of 25 students or more would not be appropriate for Anthony, a position consistent with recommendations provided by Anthony's teachers and therapists. This letter had the effect of initiating a hearing before an Impartial Hearing Office ("IHO"), which took place over the course of four days between November 1 and December 13, 2001. In the meantime, Anthony's parents enrolled him at the Upton Lake Christian School ("Upton Lake"), a parochial school in Clinton Corners, New York, instead of Bishop Dunn. At Upton Lake, Anthony repeated fourth grade in a regular education class of 14 students.

The School District's initial position before the IHO was that Anthony's placement at the Smith School was appropriate and that the unilateral placement at Upton Lake was not appropriate. After one of its own witnesses testified that the class size and program it offered to Anthony was not appropriate, the School District conceded that the placement offered to Anthony at the Smith School was not appropriate. This left the School District with the defense that the Upton Lake placement was equally inappropriate and that it was not required to bear the expense of educating him there.

On February 22, 2002, the IHO accepted the concession of the School District that it "has failed to offer A[nthony] a free and appropriate public education." The IHO also agreed with Anthony's parents that he "needs a small structured classroom setting with an aid to assist him." Nevertheless,

the IHO agreed with the School District that Upton Lake was not an appropriate placement for Anthony and concluded that the School District was not required to reimburse plaintiffs for his tuition. Specifically, the IHO found that the placement of Anthony at Upton Lake was inappropriate because he was not making academic or social progress there. This conclusion was based on the fact that Anthony was inattentive in class, he received "needs improvement" in English, bible, history, and science; "needs improvement" in behavior; and unsatisfactory grades in reading and math on his Five Week Progress Report. In addition, Anthony's first grading period report card demonstrated that Anthony needed improvement in math, language arts, penmanship, spiritual growth, social growth, and independent work, and that he received unsatisfactory grades in reading worksheet activities, applying spelling skills to writing, and work and study habits. Nevertheless, the IHO ordered the School District to provide consultant teacher services, counseling, occupational therapy, and a one-to-one aide to Anthony at Upton Lake. The IHO's decision was based on evidence received through December 13, 2001.

Both parties filed an administrative appeal of the IHO's ruling to the State Review Officer ("SRO"). On the appeal, the School District "conceded that the regular education class placement recommended by its CSE did not appropriately address the student's needs" and it did "not challenge . . . the hearing officer's finding that it failed to offer" Anthony a free appropriate public education. On March 20, 2003, the SRO affirmed both the IHO's order denying tuition reimbursement and the order requiring the School District to provide Anthony a direct consultant teacher and a one-to-

one aide at Upton Lake. In concluding that Upton Lake was inappropriate, the SRO emphasized that Anthony's academic performance during the first and second quarters of 2001-2002 continued to be poor and that, while Upton Lake "appeared to address some of [Anthony's] organizational and social needs, it did not adequately address his deficits in math, written expression, and handwriting." Moreover, he also observed that Upton Lake provided Anthony "with accommodations, not specialized instruction in his main areas of need." The SRO did not consider evidence of Anthony's performance at Upton Lake during the third and fourth quarters of the 2001-02 academic year.

On July 18, 2003, plaintiffs filed a complaint in the Southern District of New York seeking tuition reimbursement for the 2001-02 school year. After a bench trial, Judge Brieant held that, in light of the additional evidence adduced at trial, Upton Lake was an appropriate placement for Anthony. Although mindful that a district court should defer to an SRO's educational experience, Judge Brieant emphasized that his decision was "not based solely on the evidence before the SRO," but was informed by additional evidence of Anthony's progress, including testimony of Anthony's social and behavioral development, his Stanford Achievement Test results, and his year-end grades. Anthony's teacher testified that during the second half of the year at Upton Lake, Anthony had "continued to make steady progress. He gained in emotional stability. He gained in the ability to work independently. He improved his grades tremendously." Moreover, the record before the SRO did not contain evidence of Anthony's "phenomenal" results from the Stanford Achievement Test, including evidence that Anthony

completed the test without any special accommodations, and that he had scored below average in only two subcategories under math procedure and one subcategory under reading comprehension, while scoring average or above average in every other category and subcategory, including reading vocabulary, reading comprehension, mathematics problem-solving, mathematics procedure, language, spelling, study skills, science, social science, listening, using information and thinking skills. Finally, the SRO did not have the benefit of Anthony's grades from the final two marking periods. As noted by Judge Brieant (and reflected in Anthony's final report card), Anthony's grades "increased in every subject with the exception of spelling from the first to the fourth marking period. Most notably, his grade in math increased from a 63 to a 91 and his reading grade increased from a 67 to a 91."

While Judge Brieant acknowledged that Upton Lake had neither provided Anthony with an individual aide nor with direct consultant teacher services, he was satisfied that Anthony's teacher, Ms. Linda Fredericks, had worked with Anthony individually when possible, and that "she also made certain testing and other academic modifications for Anthony to assist him in successfully completing his assignments." He also noted that, as Anthony progressed over the course of the year, the need for individual attention lessened. Concluding that the facts from the administrative record and the trial demonstrated that "Anthony made meaningful academic and social progress and received educational benefit," Judge Brieant awarded tuition reimbursement to plaintiff-appellees in the amount of $3,660.00. He noted that, while the SRO had not addressed whether equitable

considerations would prohibit an award of tuition reimbursement, there was no evidence on the record to disturb the IHO's finding "that the equities favored tuition reimbursement" if on appeal it is found that the parent's placement is appropriate. Judge Brieant also awarded attorneys' fees in the amount of $34,567.00, or $10,903.13 less than the total amount requested by the parents, while expressing concern over the total expenses of the litigation in light of the relatively small tuition sum sought and awarded.

The School District appeals from the judgment entered by Judge Brieant. It argues that the private school education for which reimbursement was sought was not an appropriate placement, that the district court failed to accord appropriate deference to the administrative findings, that equitable circumstances do not warrant an award and that the district court abused its discretion both in considering additional evidence and in determining the attorney fee award. The School District also argues that the 1997 amendments to the IDEA, 20 U.S.C. § 1400 et *seq.*, established a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for reimbursement and that plaintiffs have failed to satisfy that requirement.

DISCUSSION

Congress enacted the IDEA to promote the education of children with disabilities, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related

services designed to meet their unique needs [and] . . . to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1); *see Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). A free appropriate public education "must include 'special education and related services' tailored to meet the unique needs of a particular child, and be 'reasonably calculated to enable the child to receive educational benefits.' " *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir.1998) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)) (internal citation omitted).

The key element of the IDEA is the development of an IEP for each handicapped child, which includes "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368, 105 S.Ct. 1996. The IEP is collaboratively developed by the parents of the child, educators, and other specialists. 20 U.S.C. § 1414(d)(1)(B); *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). New York has set forth regulations to implement the goals of the IDEA, which "appear to track the IDEA closely." *Bd. of Educ. v. O'Shea*, 353 F.Supp.2d 449, 454 (S.D.N.Y.2005); *see* N.Y. Comp.Codes R. & Regs. tit. 8, § 200.1 *et seq.* "In developing a particular child's IEP, a [Committee on Special Education] is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4) managerial or behavioral needs." *Walczak*, 142 F.3d at 123 (citing N.Y. Comp.Codes R. & Regs. tit. 8 § 200. 1(kk)(2)(i) (1997)).

Appendix G

If a state fails in its obligation to provide a free appropriate public education to a handicapped child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state. *Burlington*, 471 U.S. at 370, 105 S.Ct. 1996; *M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 102 (2d Cir.2000). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two pronged test: (1) was the IEP proposed by the school district inappropriate; (2) was the private placement appropriate to the child's needs. *See Burlington*, 471 U.S. at 370, 105 S.Ct. 1996; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). Moreover, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington*, 471 U.S. at 374, 105 S.Ct. 1996; *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir.2000); 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. *M.S.*, 231 F.3d at 104. Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education. *See* 20 U.S.C. § 1401(9). An appropriate private placement need not meet state education standards or requirements. *Carter*, 510 U.S. at 14, 114 S.Ct. 361. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student.

Id. In addition, parents "may not be subject to the same mainstreaming requirements as a school board." *M.S.*, 231 F.3d at 105 (citing *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir.1999) (holding that "the test for the parents' private placement is that it is appropriate, and not that it is perfect")).

Subject to the foregoing exceptions, the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement. Ultimately, the issue turns on whether a placement-public or private-is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Muller ex rel. Muller v. Comm. on Special Educ.*, 145 F.3d 95, 105 (2d Cir.1998). While the IDEA does not require states to "maximize the potential of handicapped children," *Rowley*, 458 U.S. at 213, 102 S.Ct. 3034, it must provide such children with "meaningful access" to education, *Walczak*, 142 F.3d at 133. With these goals in mind, we have held that for an IEP to be reasonably calculated to enable a child to receive an educational benefit, it must be "likely to produce progress, not regression." *Id.* at 130 (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir.1997)). Courts must, therefore, "examine the record for any 'objective evidence' indicating whether the child was likely to make progress or regress under the proposed plan." *Id.* (quoting *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir.1997)). Thus, "in the regular classrooms of a public school system, the achievement of passing marks and regular advancement from grade to grade

will be one important factor in determining educational benefit." *Rowley*, 458 U.S. at 207 n. 28, 102 S.Ct. 3034; *see also Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93 (2d Cir.2003) (noting that "[p]assing grades are . . . often indicative of educational benefit"). Although it is more difficult to assess the significance of grades and regular advancement outside the context of regular public classrooms, these factors can still be helpful in determining the appropriateness of an alternative educational placement. *See Walczak*, 142 F.3d at 130.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. *See Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir.2001) (holding that a unilateral private placement was appropriate where, *inter alia*, class sizes were small, the student made significant educational progress, and his grades and behavior improved significantly). To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. *See M. S.*, 231 F.3d at 105 ("The test for parents' private placement is not perfection.") (internal quotation marks omitted). They need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a

handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034 (internal quotation marks omitted).

With this as a backdrop, we turn to two of the principal arguments of the School District, namely, that the enrollment of Anthony at Upton Lake was not appropriate to his needs and that, because Anthony had not previously received special education and related services, his parents are not entitled to reimbursement even if Upton Lake provided him with an appropriate special education. The School District describes the latter argument as its "absolute defense."

1. The Appropriateness of the Upton Lake Placement

The School District argues that, because Anthony "did not receive specialized instruction in any of his primary areas of need-written expression, handwriting, and math," Upton Lake was not an appropriate placement for him. The School District relies on *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir.2003), which held that a private placement was not appropriate because it had not provided the student with any of the special education services needed, even though the placement included smaller classes and the student had received better grades. The principle for which *Medina* is cited, however, is not as broad as the School District suggests. *Medina* held specifically that "a unilateral private placement cannot be regarded as 'proper under the [IDEA]' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient." *Id.* In this case, the concession of

the School District that its IEP was inappropriate came after the testimony of one of its witnesses, a teacher at the Smith School, that "a regular fifth grade class might not be best suitable" for Anthony, even with "direct consultant teacher services" and "a one-to-one aide." Instead, she recommended a combined, self-contained 22 fourth and fifth grade class in a classroom of nine students, as opposed to a regular classroom of 26-30 students, because she believed "a small class . . . would be the better place for him." Moreover, the IHO also agreed that the placement of Anthony at the Smith School was deficient because of its class size, and the SRO accepted the concession of the School District that its placement was inappropriate. The small class size offered at Upton Lake was one element of the special education services necessary to address a significant deficiency in the inappropriate public school placement the School District offered Anthony, and it comes within the IDEA definition of "special education," namely, "specially designed instruction . . . to meet the unique needs of a child." 20 U.S.C. § 1401(29).

We need not decide that small class size alone rendered the Upton Lake placement appropriate because Anthony's teacher at Upton Lake, Ms. Fredericks, adapted her instruction to meet his needs. Ms. Fredericks worked with Anthony one-on-one, created a communications book, gave Anthony extra time to complete work, and allowed him to work in isolated areas of the classroom. Ms. Fredericks also adapted the methodology of instruction by allowing Anthony to take tests orally. The transcript of the hearing before the IHO includes testimony that Anthony received assistance from a volunteer teacher's assistant, who, while working with

other students, spent time with Anthony, and "assist[ed] A[nthony] greatly throughout the day."

Moreover, Anthony's social and academic progress, and his score on the Stanford Achievement Test, support the appropriateness of the placement. These factors, as discussed above, indicate that the placement was reasonably calculated to enable him to receive educational benefits, especially when coupled with the adaptations made by Anthony's teacher. While the SRO, reasoning without the benefit of Anthony's final grades, had emphasized that Anthony had failed math for the first and second quarter of 2001-2002, and that Upton Lake did not address his deficits in math, Judge Brieant noted that Anthony's grade in math increased from a 63 to a 91 and his reading grade had increased from a 67 to 91.

The School District also challenges the finding of Anthony's "phenomenal" performance on the Stanford Achievement Test, noting that "no supplemental evidence offered at trial established any baseline from which to draw this comparison." This argument ignores the testimony at trial that Anthony was given a portion of the Stanford Achievement Test as a placement exam in August 2001, prior to his enrollment at Upton Lake, that he was unable to complete any problems in the math section, and that he completed only "a few" reading comprehension problems and that he was unable to write anything. Anthony's answers to this exam, and the test material itself, were entered as exhibits at trial. Contrary to the claim of the School District, this evidence provides a useful measure by which to compare Anthony's subsequent performance on the entire exam eight months later, whereupon he performed in the average or

above average range in every subject except for three subcategories in mathematic procedures and reading comprehension.

The School District relies on *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 (1st Cir.2002), for the proposition that "[e]ven if the child makes academic progress at the private school, 'that fact does not establish that such a placement comprises the requisite adequate and appropriate education.' " In *Rafferty*, parents of a child who had difficulty reading sought reimbursement for their child's unilateral placement in a reading clinic where she "spent four to five hours a day, five days a week alone with a clinician working on reading" but "did not study *any* other subjects, such as social studies, math, English, or science." *Id.* at 26 (emphasis added). Because of the absence of instruction in any subject but reading, *Rafferty* held that the child's demonstrated progress in reading, while not surprising, was insufficient to demonstrate that her placement was appropriate. *Id.* at 26-27. *Rafferty* is plainly distinguishable on its facts from the present case because Anthony studied a wide range of academic subjects at Upton Lake.

Nor is this a case in which Anthony's progress can be attributed reasonably to "mere happenstance." *Medina*, 348 F.3d at 522 n. 6. Anthony was provided with a small class size, which everyone agreed was critical, and his program was specially designed to accommodate his needs. The progress he made was more likely attributed to these factors than to "mere happenstance." Indeed, the IHO and SRO did not find Anthony's placement at Upton Lake inappropriate because the progress he made was "mere happenstance."

Instead, they relied in significant part on the fact that, as of December 13, 2002, Anthony was doing poorly at Upton Lake and evidence suggested a lack of progress.

If Judge Brieant had reached the opposite conclusion based on the same record, we would likely not affirm that decision because "[a]n assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where . . . the district court's decision was based solely on the record that was before the SRO." *M. S.*, 231 F.3d at 105. Judge Brieant, however, was able to rely on evidence that was not available to the SRO to conclude that Anthony had made significant progress. This progress, viewed together with small class size and the program offered at Upton Lake, is sufficient to support Judge Brieant's judgement that Anthony received an education "reasonably calculated to enable the child to receive educational benefits." *Knable*, 238 F.3d at 770. In reaching this conclusion, Judge Brieant recognized the deference to which the judgement of the SRO is generally entitled and he correctly applied the rule that, when reviewing administrative decisions, federal courts "must base their decisions on 'the preponderance of the evidence,' taking into account the evidence in the administrative record *and* 'any further evidence presented before the District Court by the parties.'" *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 380 (2d. Cir.2003) (citing 20 U.S.C. § 1415(i)(2)(B)).

2. The School District's "Absolute Defense"

The School District argues that it has "an absolute legal defense" to Anthony's parents' claim for reimbursement, even

if Upton Lake provided him with an appropriate public education. This defense is based on one of the 1997 amendments to the IDEA, 20 U.S.C. § 1412(a)(10)(C)(ii), which the School District argues, "established a statutory threshold for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district." Specifically, it argues that it may deny reimbursement to the parents of disabled students who had enrolled them in regular public or private schools prior to the emergence of the need for a free appropriate public education to meet their unique needs. Only after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement. Because Anthony never received special education and related services from a public agency prior to his enrollment at Upton Lake, the School District argues, his parents are not entitled to reimbursement for his tuition there.

The justification offered for this argument is the assertedly plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes reimbursement to the parents of a disabled child, "who previously received special education and related services under the authority of a public agency" and who enrolled the child in a private elementary or secondary school without the consent or referral of the private agency, "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii). Because the authority granted by this subsection applies to the reimbursement of parents of

disabled children, "who previously received special education and related services under the authority of a public agency," the School District argues that it should be read as implicitly excluding reimbursement to parents who enrolled their child in a public or private school before the need for a free appropriate special education manifested itself. "The clear implication of the plain language, however, is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school." *Bd. of Educ. v. Tom F.*, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005). We disagree.

As in all statutory interpretation cases, we begin with the language of the statute. Our first task "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). Our inquiry ends, if the language of the statute is unambiguous and "the statutory scheme is coherent and consistent," unless the case comes within the category of cases in which the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms. *Id.* at 450, 459, 122 S.Ct. 941 (internal quotation marks and citation omitted); *United States v. X-Citement Video Inc.*, 513 U.S. 64, 69, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). If, however, the terms of a statute are ambiguous, "we resort to the canons of statutory construction to help resolve the

ambiguity." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir.2006). Moreover, while the Supreme Court has said that it "rarely" invokes the need to avoid an absurd result to override the plain language of a statute, *Barnhart*, 534 U.S. at 459, 122 S.Ct. 941, we have long held that where a statute is ambiguous, it "should be interpreted in a way that avoids absurd results." *See, e.g., United States v. Dauray*, 215 F.3d 257, 264 (2d Cir.2000).

Whether a statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). We have applied a similar approach in determining whether a provision of a contract is ambiguous. Specifically, we have held that "[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *O'Neil v. Retirement Plan for Salaried Employees of RKO, Inc.*, 37 F.3d 55, 59 (2d Cir.1994) (internal quotations omitted).

The plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services. Indeed, the School District's need to rely on an inference to be drawn from the plain language, rather than the language itself, suggests a degree of ambiguity

that would not necessarily be present if § 1412(a)(10)(C)(ii) was the only section of the IDEA that spoke to the issue of the remedy that a district court may award. This section, however, is not the only section or even the principal section of the IDEA that speaks to this issue.

Another section of the IDEA, 20 U.S.C. § 1415(i)(2)(C), authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to "grant such relief as [it] determines is appropriate." In *Burlington*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385, the Supreme Court held that the identically worded predecessor of this section, 20 U.S.C. § 1415(e)(2) (1984), authorized the equitable remedy of tuition reimbursement to parents who had enrolled their disabled child in a private school while they successfully litigated the issue of the inappropriateness of his public placement. Then-Justice Rehnquist explained the reasoning of the decision as follows:

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet

> their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. *See* § 1412(5); 34 CFR §§ 300.132, 300.227, 300.307(b), 300.347 (1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Burlington, 471 U.S. at 369-70, 105 S.Ct. 1996.

Prospective relief alone is not a sufficient remedy because the process of obtaining the relief "is ponderous" and a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." *Id.* at 370, 105 S.Ct. 1996. Under these circumstances, "it would be an empty victory to have a court tell [parents who placed their child in a private school] several years later that they were right," yet deny them reimbursement for the placement. *Id.* "If that were the case," Justice Rehnquist concluded, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because

Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement as an available remedy in a proper case." *Id.*

The language of § 1415(e)(2), upon which *Burlington* relied, was unchanged by the 1997 revision of the IDEA and continues to provide that the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The re-enactment of § 1415(e)(2), without change, is significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment. *Shapiro v. United States*, 335 U.S. 1, 16, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 500, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). Whether 20 U.S.C. § 1412(a)(10)(C)(ii), upon which the School District relies, was intended to eliminate the power of a district court to grant the relief to which Anthony's parents would otherwise be entitled, involves a question to which the IDEA does not provide an unambiguous answer. Indeed, the assertedly "clear implication of the plain language" of § 1412(a)(10)(C)(ii), *Tom F.*, 2005 WL 22866, at *3, is inconsistent with the clear implication of § 1412(a)(10)(C)(i), which in relevant part provides that the obligation of a state to offer a free appropriate education "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." The implication of this subsection is that reimbursement is

available where, as here, the agency failed to make a free public education available to the child. *See Carmel Cent. Sch. Dist. v. V.P. ex rel. G.P.*, 373 F.Supp.2d 402, 414 (S.D.N.Y.2005) ("Subsection (i), read alone, suggests that the failure of a district to make a [free appropriate public education] available to a student in the first instance would entitle the parents to reimbursement even if the child had not previously received services.").

Under these circumstances, we think it is hardly clear from the fact that § 1412(a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. Our conclusion is supported by the cases in which a party relies on the Latin maxim *"expressio unius est exclusio alterius,"* that the express statutory mention of certain things impliedly excludes others not mentioned. The School District may not invoke this maxim here, because it "applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded." *United States v. City of New York*, 359 F.3d 83, 98 (2d Cir.2004) (internal quotation marks and citation omitted). Nevertheless, even where the maxim is otherwise applicable, the Supreme Court has not treated as conclusive the inference that Congress intended to exclude that which it did not explicitly include. Instead, it has treated the maxim "as but an aid to construction." *Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 n. 8, 64 S.Ct. 120, 88 L.Ed. 88 (1943). Indeed, only recently the Supreme Court held that "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress

considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003).

Where, as here, the terms of a statute are ambiguous, we turn to the "traditional canons of statutory construction to resolve the ambiguity." *United States v. Peterson*, 394 F.3d 98, 105 (2d Cir.2005). "Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text," *Nat'l. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir.2001), several rules are particularly helpful in interpreting the statutory provision at issue in this case. Where the terms of a statute are ambiguous, we "focus upon the 'broader context' and 'primary purpose' of the statute." *Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir.2003) (quoting *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir.1998)) (citations omitted); *see also Nat'l. Res. Def. Council*, 268 F.3d at 98 ("[W]hen determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure."). Ultimately, as Justice Jackson observed, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Joiner*, 320 U.S. at 350-51, 64 S.Ct. 120; *see also Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.1945), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945) ("[S]tatutes always have some purpose

or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.") (Hand, L., J.) (quoted with approval in *Pub. Citizen*, 491 U.S. at 455, 109 S.Ct. 2558).

A second and related rule of statutory construction is that the meaning of an ambiguous statutory provision is "clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (quoting *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). The rule is particularly applicable here, because the issue involves an ambiguity created by the tension between different sections of the IDEA rather than the interpretation of an ambiguous word or phrase.

Applying these rules in the present case, we again observe that the express purpose of the IDEA is to ensure that a free appropriate public education is "available to all children with disabilities." Indeed, the IDEA is the legislative centerpiece of "an ambitious federal effort to promote the education of handicapped children." *Voluntown*, 226 F.3d at 62 (quoting *Walczak*, 142 F.3d at 122). Its central purpose is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" and "to ensure that the rights of children with disabilities and parents of such

children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA also provides that a state's eligibility for IDEA funding is that it make available "free appropriate public education . . . to all children with disabilities." 20 U.S.C. § 1412(a)(1).

One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). While the manner in which the authority is exercised may be guided by the various subsections of § 1412(a)(10), which mainly codified existing law in significant respect, *Voluntown*, 226 F.3d at 69 n. 9, nothing in the legislative history (to be discussed shortly) suggests that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private placement where a free appropriate public education had not been provided under the circumstances here.

The Supreme Court has also instructed us that, because "[t]he [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Burlington*, 471 U.S. at 372, 105 S.Ct. 1996; *Carter*, 510 U.S. at 12-13, 114 S.Ct. 361; *see also Still v. DeBuono*, 101 F.3d 888, 893 (2d Cir.1996). The construction of the § 1412(a)(10)(C)(ii) that the School District urges upon us would defeat both purposes of the IDEA. The construction

we adopt is the only one that "produces a substantive effect that is compatible with the rest of the law." *Cleveland Indians Baseball Co.*, 532 U.S. at 217-18, 121 S.Ct. 1433 (quoting *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 371, 108 S.Ct. 626).

This brings us to the last rule of statutory construction applicable here. This rule, as we previously observed, is that ambiguous statutes are to be construed so as to avoid absurd results. The School District's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would produce such results. It would, for instance, prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age. It would also place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement. Such a result, it has been suggested, "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate." *Tom F.*, 2005 WL 22866, at *3. This suggestion turns on the erroneous assumption that parents would have to keep their child in a public school placement until it was clear that their "speculation" was borne out by a wasted year of actual failure. Such a "first bite" at failure is not required by the IDEA. All that is required of parents who have received an IEP for their child is that they provide the appropriate public agency with reasonable notice that they plan to "reject [ ] the placement proposed by the public agency to provide a free appropriate public education to their child, including

stating their concerns and their intent to enroll their child in a private school at public expense." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb). Because such notice was provided here, Anthony's parents would have been free to enroll him in a private school if they had enrolled him first in the Smith School as provided in the IEP and then removed him thereafter.

We believe that it is unreasonable to suggest that Anthony's parents were legally required to engage in such a useless and potentially counterproductive exercise, given Anthony's "need for constant and consistent care, even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional, and psychological deterioration." *Connors v. Mills*, 34 F.Supp.2d 795, 804 (N.D.N.Y.1998). We decline to interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education in this manner in order to qualify for the right to seek tuition reimbursement.

Our interpretation is consistent with that of the Department of Education's Office of Special Education & Rehabilitative Services. Specifically, the agency wrote in response to an inquiry:

> In our view, it does not appear that this question presented by your query-namely, whether actual receipt of some form of special education and related services from a public agency is a prerequisite for a parent's ability to seek tuition reimbursement for all or part of the cost of their child's unilateral private school placement-is

> answered by § 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] of IDEA 297. We do not view § 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. In such a case, a parent may wish to avail him or herself of due process and judicial action, so that a hearing officer or court can determine whether there has been a denial of [a free appropriate public education], and, if so, whether and to what extent tuition reimbursement would be warranted.

Letter to Susan Luger, listed in 65 Fed.Reg. 9178 (Feb. 23, 2000) and reprinted in 33 I.D.E.L.R. 126 (March 19, 1999). While the interpretation comes in the form of an informal letter, deference to a policy letter may be appropriate where the statutory language is ambiguous. *Honig*, 484 U.S. at 325 n. 8, 108 S.Ct. 592. We have suggested that the degree of deference remains unclear. *See St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 171 (2d Cir.2001). Nevertheless, we need not resolve this issue here because we do not so much defer to the OSEP letter as we take comfort from the fact that it is consistent with our own construction of an ambiguous statute.

Contrary to the School District's argument, the legislative history does not alter our conclusion. The issue is addressed in the Report of the House Committee on Education and the

Workforce. The Report begins by explaining that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." H.R. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. One of the changes to the IDEA is the addition of 20 U.S.C. § 1412, the purpose of which is explained as follows:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

H.R.Rep. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

At best, this language is an awkward paraphrase of the ambiguous statutory language which refers to "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency." Again, the statutory language does not expressly exclude reimbursement where special education and related services have not been previously provided, it only provides a basis for the argument that Congress implicitly excluded

reimbursement in these circumstances. The district judge in *Tom* F., however, read the language in the House Report to require explicitly that the child "must" have "[p]reviously . . . received" such services as a condition to the receipt of reimbursement of his parents. 2005 WL 22866, at *3. We cannot agree.

A natural reading of the word "previously," in the context of a report detailing changes to the IDEA, would suggest a reference to the IDEA's previous requirements. Thus, the first sentence of the paragraph unequivocally provides reimbursement for a private placement "when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent." The second sentence explains that "*[p]reviously*, the child must have received special education and related services under the authority of a public agency." (emphasis added). To paraphrase the words of the Supreme Court in an analogous context, *Lindh v. Murphy*, 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), "[a] thoughtful Member of the Congress" reading this explanation for a change in prior law would have very likely concluded (1) that "previously," meaning prior to the proposed amendment to the IDEA, parents could receive reimbursement for a private placement only if the child received special education and related services under the authority of a public agency and (2) that the change afforded by the proposed amendment would permit funding even where the disabled child had not previously received such special education and related services. This is just the opposite of what the School District and *Tom F.* argue is the clearly expressed intent of Congress.

Appendix G

The House Report gives no indication that Congress intended to amend the IDEA's rules regarding tuition reimbursement. Indeed, the House Report makes no reference to prior law on the issue and expresses no intent to limit the discretion that *Burlington* vested in district courts to award reimbursement pursuant to 20 U.S.C. § 1415(i)(2)(B). Nor does it explain the reason why it attached the condition at issue here to private placement reimbursement. Indeed, the House Report is as significant for what it does not say as for what it does say.

Justice Scalia has marshaled persuasively the dangers of relying on congressional committee reports in interpreting statutes. Antonin Scalia, *A Matter of Interpretation* 19-36 (Princeton University Press, 1998). We have not accepted Justice Scalia's argument that such reports should never be resorted to in construing a statute. *See, e.g., Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336-37 (2d Cir.2005). Nevertheless, the House Report in this case is of a kind that calls to mind the admonition that "[r]eliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). We decline to take that step here and to pay any deference to the confusing explanation of the purpose of § 1412(a)(10)(c)(ii). Cf. *Gottlieb*, 436 F.3d at 337-38, (holding that resort to legislative history is appropriate only if the plain language of the statute and the canons of statutory interpretation fail to resolve an ambiguity).

Appendix G

This brings us to the last leg of the School District's argument-its reliance on *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir.2004). *Greenland* held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement. *Id.* at 159-60. Indeed, rather than simply denying the parent's claim for reimbursement on the ground that their child had not previously received special education and related services from a public agency, *Greenland* canvassed the entire statutory scheme, including § 1412(a)(10)(c)(ii), and concluded that "[t]hese statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." *Id.* at 160 (emphasis in original) (citations omitted). We do not regard *Greenland* as dispositive.

Greenland's discussion of 20 U.S.C. § 1412(a)(10)(C)(ii) arose from its perceived need to deal with the subsection immediately preceding it. Again, this subsection, § 1412(a)(10)(C)(i), says that a local education agency is not required to pay for the cost of education, including special education and related services, "if that agency made a free public education available to the child and the parents elected to place the child in such private school or facility." This language troubled the *Greenland* Court, because it implied that parents are entitled to

reimbursement if a free appropriate public education was not provided "where, as here [in *Greenland]*, the local education agency was never informed while the child was in public school that the child might require special education services." 358 F.3d at 159. This "seeming ambiguity," according to *Greenland*, "disappears when considered in light of the section's affirmative requirement that 'the parents of a child with a disability, who previously received special education and related services under the authority of a public agency' can receive reimbursement for their unilateral placement of the child in private school only 'if [a] court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.' " *Id.* (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)). *Greenland* continued as follows:

> These threshold requirements are key to this case: tuition reimbursement is *only* available for children who have previously received "special education and related services" while in the public school system *(or perhaps those who at least timely requested such services while the child is in public school).* There is no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland. There is also no dispute that she was removed from Greenland for reasons having nothing to do with any issue about whether Katie was receiving [a free appropriate public education].

Id. at 159-60 (emphasis added). The *Greenland* Court then went on to deny the parents' claim for reimbursement because

of their failure to alert the School District of Katie's need for special education and related services while she was in public school. We agree completely with the result reached in *Greenland.* Indeed, we reached the same result in *Voluntown*, 226 F.3d at 68-69, without reference to § 1412(a)(10)(C)(ii).

Our problem with the analysis in *Greenland* is that it assumes that the ambiguous language of § 1412(a)(10)(C)(ii) is clear by adding the word "only" to the language of the subsection. Indeed, not a single word of the language we have emphasized in the foregoing quote appears in the language of the subsection. This includes the suggestion that a child in public school need not have previously received "special education and related services;" the child need only have made a request for it while in a public school. Simply stated, without discussion or analysis, *Greenland* resolved the issue of the ambiguity of § 1412(a)(10)(C)(ii) by simply amending the language itself. Moreover, it did so in a way, perhaps inadvertently, that implicitly suggested an arbitrary distinction between children enrolled in a regular public school and children enrolled in a regular private school. Perhaps even more troubling is that none of this discussion was necessary, because the subdivision immediately following § 1412(a)(10)(C)(ii) makes "clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue." *Greenland*, 358 F.3d at 160 (emphasis in original) (relying on 20 U.S.C. § 1412(a)(10)(C)(iii)). Indeed, the latter subsection expressly states that "[t]he cost of reimbursement described in clause (ii) may be reduced or denied," if the prescribed notice is not given, 20 U.S.C.

§ 1412(a)(10)(C)(iii)(I), or "upon a judicial finding of unreasonableness with respect to actions taken by the parents," 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Separate and apart from subsection 1412(a)(10)(C)(ii), we have held that it is inequitable to permit reimbursement under the circumstances in *Greenland.* As we have observed: "[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." *M.C.*, 226 F.3d at 68. Indeed, in *Carmel*, 373 F.Supp.2d at 417, where the district judge followed the analysis of *Greenland* as it related to § 1412(a)(10)(C)(ii), she also denied reimbursement on the alternative ground that "the parents are not equitably entitled to tuition reimbursement." *Id.* at 407.

Unlike the parents of the child in *Greenland*, who provided "no notice at all to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education," 358 F.3d at 160, in the instant case, Anthony's parents provided the School District with ample notice that he was in need of special education and the School District evaluated his needs in 2000, when he was classified as learning disabled, and again in 2001 at the request of his parents. When the School District provided Anthony with an IEP that Anthony's parents believed was inappropriate, Anthony's parents gave timely notice of their dissatisfaction to the School District. Before his enrollment in Upton Lake, the School District had every opportunity to evaluate Anthony in the regular private school that he was attending and determine whether "a free

appropriate public education can be provided in the public schools." *Id.* After forcing a hearing before an IHO, it conceded that it had failed to provide the free appropriate public education required by the IDEA. Section 1415(i)(2)(B), as construed by the Supreme Court in *Burlington*, provides an ample basis for the award of reimbursement to Anthony's parents. Section 1412(a)(10)(C)(ii) does not prohibit it.

We have considered carefully the other arguments raised by the School District and conclude that they are without merit. Accordingly, the judgment of the district court is affirmed.